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No. 80-1686

IN THE

Supreme Court of the United States

October Term, 1980

IN RE CORRUGATED CONTAINER ANTITRUST LITIGATION

THE MEAD CORPORATION,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, et al.,
Respondents.

BRIEF OF THE REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: May 7, 1981

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Was the Court of Appeals within its discretion in declining to issue a writ of mandamus to grant interlocutory review of the District Court's discretionary decision to bifurcate one narrow issue concerning damages from the issues of violation, impact, and class-wide measure of damages in the jury trial of this complex antitrust litigation?

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BRIEF OF THE REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Real Parties in Interest to these proceedings, the representative plaintiffs and the certified plaintiff class in the multidistrict Corrugated Container Antitrust Litigation (M. D. L. No. 310) now pending in the United States District Court for the Southern District of Texas, respectfully oppose the petition for certiorari in the within matter.

STATEMENT OF THE CASE

A. Preliminary Statement

After nearly four months of trial, a jury in the United States District Court for the Southern District of Texas found that Petitioner Mead had participated for many years in a price-fixing conspiracy that damaged all purchasers of corrugated containers and corrugated sheets throughout the United States by a minimum of 5% of the purchase prices paid. (Pl. App. at A1-A7).[1] Before submitting the case to the jury, the District Court bifurcated the issue of calculating the dollar amount of damages from the issues of liability, impact, and classwide measure of damages. The measure of damages was submitted to the jury as a percentage overcharge. The bifurcated issue of calculating the dollar amount of damages consists of determining the dollar amount of sales by conspirator manufacturers to class members, then multiplying by the classwide percentage measure of damages.[2] The damage calculation proceedings are now under way in the District Court.

Petitioner Mead seeks through these mandamus proceedings to avoid or delay the consequences of the jury's verdict, without waiting for the verdict to be reduced to final judgment.[3] The Court of Appeals unanimously denied the present mandamus application within four days of receiving plaintiffs' response thereto.

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1. Copies of portions of the record cited herein are included in the Appendix to this Brief in Opposition. That Appendix is cited as Pl. App. at —; the Appendix to Mead's Petition is cited as Mead App. at —.

2. See discussion at p. 6, *infra*.

3. Mead has an obvious financial motive to delay the entry of judgment. Post-judgment interest, even at 6%, could amount to as much as $5 million per month.

Mead's petition misstates and distorts the record in a number of important respects. In the first place, Mead attempts to portray the proceedings below as a reopening of the trial record, to cure a purported "failure of proof", when in fact the trial court merely bifurcated a single damage issue (calculation of the dollar amount of damages) from the remaining issues of violation, impact, and measure of damages, before submitting the latter issues to the jury. Plaintiffs never asked for a reopening of the record, and the District Court never ordered one at plaintiffs' request.[4] Mead has created the fiction of a reopening because the real proceedings below are not susceptible to legitimate criticism.

Mead's petition also creates the false impression that the District Court misled the parties throughout the trial into believing that no issues would be bifurcated, and that the bifurcation did not take place until after the trial was over. The truth is that many events, including the court's class certification opinion more than a year before the trial,[5] the submission of plaintiffs' proposed pretrial order with a proposed special verdict form,[6] and many discussions among the court and all parties in the course of pretrial and trial proceedings, served to alert everyone concerned that the District Court had been requested to and

4. The only reopening of the record took place at Mead's request, to allow Mead, after resting, to introduce additional evidence. (Tr. Vol. 85 at 80-81, Pl. App. at A102; Tr. Vol. 96 at 109-143, Pl. App. at A103-A123.)

5. *In re Corrugated Container Antitrust Litigation*, 80 F. R .D. 244, 253 (S. D. Tex. 1978), *mandamus denied*, No. 78-3684 (5th Cir. Dec. 29, 1978).

6. The proposed special verdict form provided only for a percentage finding as to the classwide measure of damages, and not for any finding as to the aggregate dollar amount of damages. Pl. App. at A8-A13.

was seriously considering reserving for separate proceedings the issue of calculating the dollar amount of damages.[7] The District Court definitively bifurcated the damage calculation issue before either side had closed its case. Indeed, Mead reopened its case after the bifurcation decision and introduced additional evidence. (Tr. Vol. 95, at 80-81, Pl. App. at A102; Tr. Vol. 96, at 109-43, Pl. App. A103-A123).[8] The statements in the petition that the case was not bifurcated until after the end of the trial (e.g., Petition, pp. 9, 20-21) are simply false.[9] Mead's

7. The colloquy among counsel and the court on July 28, 1980, at the close of plaintiffs' case-in-chief demonstrates beyond doubt that Mead understood before its defense began that the Court intended to bifurcate the trial and submit only the measure of damages issue to the initial jury. Tr. Vol. 55, pp. 177, 180-81, 210-13 (Pl. App. at A83-A88).

8. Just prior to trial Mead and the other defendants indicated their intention to make a number of motions, among them a motion to bifurcate *all* "damage" issues from the "liability" issues. Defendants' Preliminary Pretrial Order, ¶ IV4 (Pl. App. at A17). The District Court deemed such a motion to have been made and denied it on May 23, 1980 (Mead App. at 30a). Despite Mead's claim to the contrary, the court never modified or reversed that decision—to deny bifurcation of all "damage" issues—and the case went to the jury on all issues of liability and damages, save the last mechanical step of applying the jury-determined measure of damages to sales figures in order to arrive at the dollar amount of damages.

Because it related to all "damage" issues, the defendants' proposed bifurcation differed greatly from the narrow, single-issue bifurcation ultimately adopted by the District Court. Mead's petition is grossly misleading to the extent it portrays the two bifurcations as the same, thereby seeking to create the false impression that the District Court misled Mead by at first denying its bifurcation motion and then later adopting the very same bifurcation.

9. Contrary to the unsupported assertions of the petition, the trial court's actions were in no way a departure from accepted judicial practice. Many cases have approved bifurcation decisions

argument concerning a post-trial bifurcation thus has no application to *this* case.

Another misleading theme running through the Mead petition is that plaintiffs tried and failed to prove the dollar amount of damages before the initial jury. The fact is that plaintiffs declined to submit proof of the dollar amount of damages only after the District Court had decided to bifurcate that issue and not submit it to the initial jury. Plaintiffs had sought to introduce evidence of dollar sales figures on several occasions throughout the trial, and on each occasion Mead objected. On September 9, 1980, the day before the case went to the jury, the District Court ruled, and both plaintiffs' counsel and counsel for Mead agreed, that such evidence was immaterial in light of the bifurcation. Tr. Vol. 95, pp. 62-65 (Pl. App. at A99-A101). There was thus no failure of proof, as Mead claims, but rather the simple recognition of the practical and legal effect of the bifurcation.[10]

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9. (Cont'd.)
reached after trial is underway, or indeed concluded. *E.g., Warner v. Rossignol*, 513 F. 2d 678, 684 (1st Cir. 1975); *Braun v. Berenson*, 432 F. 2d 538, 543 (5th Cir. 1970); *cf. Franchi Constr. Co., v. Combined Insurance Co. of America*, 580 F. 2d 1 (1st Cir. 1978); *Fradette v. American Serv. Corp.*, 1979-1 Trade Cas. ¶ 62,556 (S. D. Fla. 1979).

10. To accept Mead's version of what happened, this Court would have to believe that plaintiffs' experienced antitrust counsel knowingly allowed their case to go to the jury with *no* evidence on an essential element of proof and were thus either extremely stupid, grossly neglectful, or downright suicidal. The far more plausible explanation of plaintiffs' behavior—and indeed the factual explanation—is that plaintiffs, like everyone else including Mead, had a clear understanding that the damage calculation issue was being reserved, so that evidence of dollar sales was not only unnecessary at that stage of the proceedings, but immaterial as the District Court had ruled. Tr. Vol. 95 at 63-65, Pl. App. at A99-A101.

Finally, Mead omits to tell this Court that the District Court has explicitly ordered that a second jury will decide any contested issues of fact that arise in applying the measure of damages to calculate the amount of judgment.[11] Therefore, the proceedings below do not and will not deny Mead a jury trial of any genuine issues of material fact.

As these few examples demonstrate, many of the facts Mead claims in its petition to be undisputed (Petition, pp. 5-10) are not only disputed, but false.[12]

B. Statement of Facts

The trial below lasted for more than three months. Plaintiffs presented the testimony of more than 30 witnesses from all over the United States who established to the satisfaction of the jury the existence of an extensive price-fixing conspiracy in the corrugated industry. The proof showed there was a general agreement in the corrugated industry to refrain from competing on the basis of price; that competitors would exchange price information whenever requested; that competitors would "honor", *i.e.*, not undercut, the prices exchanged; and that competitors would be "constructive in the market place" by refusing to undercut even those prices that were not subject to exchange.[13] The agreements were enforced, the evidence

11. Pretrial Order No. 60 (December 3, 1980), Mead App. at 6a-7a. Pretrial Orders of the District Court are cited as "PTO No. —."

12. The statement at pages 6-7 of the Petition, that Mead moved for a directed verdict based on a purported failure of proof of damages, is particularly egregious. Mead never moved for a directed verdict on that ground, either at the close of plaintiffs' case, the close of all evidence, or at any other time.

13. *E.g.*, Tr. Vol. 7 at 288, 292-93, Pl. App. at A73-A75 (witness Norman Lacey); Tr. Vol. 12 at 263-64, Pl. App. at A76-A78 (witness Ralph Redmond); Tr. Vol. 33 at 14, Pl. App. at A81-A82 (witness

showed, by retaliation and by pressures asserted in conjunction with trade association meetings.[14]

Direct evidence implicated numerous present and former Mead management-level employees in price-fixing activities.[15]

As noted above, the trial court in the exercise of its discretion bifurcated the single, narrow issue of the dollar amount of the conspirators' sales to class members prior to submission of the case to the jury. The court submitted the case in the manner urged by plaintiffs prior to and during the trial, with the jury instructed to make its findings by way of special verdicts.

After deliberating for three days, the jury found in favor of plaintiffs and the class and against Mead, finding by way of special verdicts: (1) that Mead was a member of a price-fixing conspiracy in the corrugated industry that continued for at least twelve years; (2) that nineteen of the 36 other manufacturers named in the Complaint had also been members of the conspiracy; (3) that the conspiracy caused financial damage to all purchasers of corrugated containers and corrugated sheets throughout the United States; and (4) that all such purchasers were damaged by a minimum 5% overcharge.[16]

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13. (Cont'd.)
Edward Schechter); Tr. Vol. 6 at 79-81, Pl. App. at A64-A65; Tr. Vol. 6 at 94-98, Pl. App. at A68-A70; Tr. Vol. 6 at 132-33, Pl. App. at A71-A72 (witness Alex Hopkins); Tr. Vol. 17 at 36, Pl. App. at A79-A80 (witness James Danahey).

14. *E.g.*, Tr. Vol. 6 at 91-94, Pl. App. at A66-A68 (witness Alex Hopkins).

15. Tr. Vol. 85 at 202-17, Pl. App. at A89-A98 (witness Robert Neff); Tr. Vol. 97 at 44-45, 63-64, Pl. App. at A124-A126.

16. The jury found in Mead's favor on the issue of fraudulent concealment, thus limiting the period for which damages may be recovered to approximately two years and ten months.

In light of the jury's special verdicts, the only task necessary to determine the dollar amount of the judgment to be entered was to ascertain the appropriate dollar sales or purchase figures, multiply by the jury's 5% measure of damages, and treble the resulting figures.[17] In October, 1980, plaintiffs moved the District Court to establish a procedure for accomplishing that task.[18] Plaintiffs suggested that the jury's verdict be applied to the sales figures of those manufacturers whom the jury found to have been members of the conspiracy,[19] and that the court appoint a special master pursuant to Rule 53 to gather the sales data for the appropriate periods of time,[20] to eliminate sales to

17. The task of calculating the dollar amount of damages has been greatly simplified by the jury's verdict, which has reduced the time period of recovery to about 2¾ years, and has eliminated the sales of 17 manufacturers. Had the District Court not bifurcated the calculation issue, the parties would have had to introduce sales or purchase evidence covering 18 years, instead of 2¾, and 37 manufacturers, instead of 20; the Court would have had to instruct the jury how to deal with the damage data depending on the many possible permutations of findings the jury might have made concerning the membership and temporal scope of the conspiracy, fraudulent concealment, and so forth; and the jury would have had to cope with sorting out the proper data to be used consistent with its various findings. The elimination of such unnecessary burden and complexity for the parties, the jury, and the Court, points up the wisdom of the District Court's bifurcation decision.

Of course, some part of the prior settlements will also have to be credited before judgment is entered.

18. Memorandum in Support of Plaintiffs' Motion for Proceedings Preparatory to Entry of Judgment. (Pl. App. at A43.)

19. By PTO No. 61, ¶ 3 (Mead App. at 10a), the District Court rejected plaintiffs' contention that Mead was liable for the sales of all manufacturers, whether or not they participated in the conspiracy. *Compare In re Beef Industry Antitrust Litigation*, 600 F. 2d 1148, 1166 & n. 24 (5th Cir. 1979).

20. Because of the jury's verdict on fraudulent concealment, the District Court has ruled that plaintiffs may recover only on the

persons who are not class members, and to report on the appropriate dollar amount of the judgment to be entered. Plaintiffs have always taken the position, and the District Court has ruled, that Mead would be entitled to a jury trial of any genuinely disputed issue of material fact that arose in the course of calculating the dollar amount of damages.[21]

In response, Mead argued that no special master should be appointed, and that in any event the measure of damages should be applied to purchase figures solicited from the 200,000 class members, rather than to sales figures available from the 20 conspirator manufacturers.

After several hearings, the District Court decided to appoint a special master and to base the damage calculations on sales data rather than purchase data. PTO No. 62 (Mead App. at 18a) [22] thus provides for the appointment of a special master to report to the court on the dollar amount of sales by Mead and its co-conspirators to the members of the class in the appropriate time period. PTO No. 62 provides, further, that the court will thereafter entertain motions for summary judgment on the dollar amount of damages and then conduct a hearing on any disputed factual issues (PTO No. 62, ¶¶ 2 *1*, 2 n, Mead

20. (Cont'd.)
basis of sales in the period March 7, 1973, through December 31, 1975 (PTO Nos. 60 and 61, Mead App. at 8a, 10a).

21. The Memorandum in Support of Plaintiffs' Motion for Proceedings Preparatory to Entry of Judgment (Pl. App. at A58) specifically stated at p. 10 that the application of the measure of damages "may be submitted to another jury if that issue is not resolved by summary judgment . . . ." See also, *id.* at p. 2, Pl. App. at A48 ("Genuinely disputed issues of fact . . . may be submitted to a jury.") Likewise, Plaintiffs' Memorandum in Support of Their Proposed Special Verdict Form, dated September 5, 1980, at p. 7 (Pl. App. at A26) states that "Any outstanding factual issue remaining would then be submitted to a jury for determination."

22. 1980-81 Trade Cas. ¶ 63,810 (S. D. Tex. 1981).

App. at 24a, 25a). The court had ruled in an earlier order that, "In the unlikely event that a contested issue is raised by the sales figures, . . . it can be dealt with by empaneling another jury." (PTO No. 60, Mead App. at 6a, 7a.)

Following the master's appointment, the plaintiffs and the master drafted six interrogatories to solicit the pertinent sales data from the twenty manufacturers involved.[23] These interrogatories were served on the manufacturers and, by order of the special master, responses were due February 23, 1981.

It was at that point, without waiting for final judgment to be entered, that Mead filed the present petition for mandamus.

After the Court of Appeals denied the mandamus petition, the special master heard and determined all objections to the sales interrogatories and has ordered that the required data be submitted to him by June 22, 1981.

23. Mead was present at that hearing, made comments on the proposed interrogatories (some of which were adopted) but refused to adopt or endorse the interrogatories.

ARGUMENT

The petition should be denied for the following reasons:

A. Mead's Attempt to Secure Review of the District Court's Interlocutory Bifurcation Decision Is Premature. Review Should Await Entry of Final Judgment.

Mead's petition brings to this Court the Court of Appeals' refusal to grant interlocutory review, by way of mandamus, of the District Court's discretionary bifurcation decision. The mere statement of the procedural posture of this matter demonstrates that Mead's petition for mandamus is premature and does not meet the stringent standards established by this Court for issuance of the extraordinary writ.

As this Court has repeatedly and consistently held, mandamus is a truly extraordinary remedy to be invoked only where no other adequate remedy is available, e.g., *Allied Chemical Corp. v. Daiflon, Inc.*, — U. S. —, 101 S. Ct. 188, 190-91 (1980); *Heltoski v. Meanor*, 442 U. S. 500 (1979); *Kerr v. United States District Court*, 426 U. S. 394, 402-03 (1976); *Ex Parte Rowland*, 104 U. S. 604, 617 (1882), where the decision sought to be reviewed is in no way discretionary, *e.g., Allied Chemical Corp. v. Daiflon, Inc., supra*, 101 S. Ct. at 190-91; *Will v. Calvert Fire Ins. Corp.*, 437 U. S. 655, 666 (1978), and where the party seeking the writ has demonstrated a clear and indisputable right to its issuance, *e.g., Allied Chemical Corp. v. Daiflon, Inc., supra*, 101 S. Ct. at 191; *Kerr v. United States District Court, supra*, 426 U. S. at 403; *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 384 (1953).

As the Court reaffirmed in *Heltoski v. Meanor, supra*, 442 U. S. at 505:

> "Almost a hundred years ago, this court explained, 'The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it.*' Ex Parte Rowland, 104 U. S. 604, 617 1861)." (Emphasis in original.)

Here the District Court's bifurcation decision, even if wrong, can be fully and adequately reviewed on appeal from the final judgment that will soon be entered. Mead has set forth no persuasive reason in its petition why such review will not be adequate.

Similarly, this Court has repeatedly endorsed the proposition that "as a general rule appellate review should be postponed . . . until after final judgment" and that interlocutory mandamus petitions should therefore be denied. E.g., *Will v. United States,* 389 U. S. 90, 96 (1967); *Allied Chemical Corp. v. Daiflon, Inc., supra,* 101 S. Ct. at 190; *Parr v. United States,* 351 U. S. 513, 520-21 (1956). Just this term the Court again emphasized the strong policy reasons underlying strict limitation of piecemeal interlocutory review, such as Mead seeks here. In *Firestone Tire & Rubber Co. v. Risjord,* — U. S. —, 101 S. Ct. 669, 673 (1981), the Court stated:

> "This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the District Judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with sensible policy of

> *'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals* from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.' [Citations omitted] The rule also serves the important purpose of promoting efficient judicial administration." (Emphasis added.)

In this case final judgment will soon be entered on the jury's verdict, and review of all issues should await that event.[24]

Moreover, since bifurcation lies within the sound discretion of the trial court,[25] mandamus is particularly inappropriate here. *Allied Chemical Corp. v. Diaflon, Inc., supra,* 101 S. Ct. at 191; *Will v. Calvert Ins. Corp., supra,* 437 U. S. at 666.

In a case virtually on all fours with this case, the Ninth Circuit has explicitly held that mandamus is not available to review an order bifurcating "liability" from "damages" issues in a complex class action case. *Arthur Young & Co. v. United States District Court,* 549 F. 2d 686 (9th Cir.) *cert. denied,* 434 U. S. 829 (1977).

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24. It should be noted that this is Mead's *fifth* interlocutory appeal from various pretrial and trial decisions of the District Court. See *In re Corrugated Container Antitrust Litigation,* 80 F. R. D. 244 (S. D. Tex. 1978), *mandamus denied sub nom. In re Alton Box Board Company,* No. 78-3684 (5th Cir. Dec. 29, 1978) (class certification); 611 F. 2d 86 (5th Cir. 1980) (appeal dismissed) (content of class notice); 614 F. 2d 958 (5th Cir. 1980) (appeal dismissed and mandamus denied) (recusal of district judge); No. 80-1093 (5th Cir. 1980) (stay denied, appeal pending) (access to grand jury transcripts).

25. *In re Master Key Antitrust Litigation,* 528 F. 2d 5, 14 (2d Cir. 1975); 5 Moore, Federal Practice § 42.03 (2d ed. 1980); 9 Wright & Miller, Federal Practice & Procedure, ¶ 2388 at 283 (1971 and 1980 Supp.).

The cases upon which Mead relies simply do not support its claim to extraordinary relief. Many of the cases arose on review of a final judgment and simply did not involve mandamus at all.[26] The few cases that did arise on mandamus are entirely distinguishable. For example, *Dairy Queen, Inc. v. Wood,* 369 U. S. 469 (1962), *Beacon Theatres, Inc. v. Westover,* 359 U. S. 500 (1959) and *In re Simons,* 247 U. S. 231 (1918), all involved total denial of a jury trial, not simply a bifurcation resulting in a trial of different issues to separate juries.[27] Similarly, in *LaBuy v. Howes Leather Co.,* 352 U. S. 249 (1957), the District Court had referred the entire trial of an antitrust case to a special master, whereas here only a single narrow issue involving complicated calculations has been referred to the master. Indeed, in the *LaBuy* case the Court expressly approved the very sort of reference adopted by the District Court here:

> "We agree that the detailed accounting required in order to determine the [antitrust] damages suffered by each plaintiff might be referred to a master after the court has determined the overall liability of defendants, provided that the use of the court's time is not warranted in receiving the proof and making the tabulations." *Id.,* at 259.[28]

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26. *Rogers v. Missouri Pacific R. R.,* 352 U. S. 500 (1959); *Jacob v. City of New York,* 315 U. S. 752 (1942); *Dimick v. Schiedt,* 293 U. S. 474 (1935); *Ward v. Cochran,* 150 U. S. 597 (1893); *Hodges v. Easton,* 106 U. S. 408 (1882); *Slocum v. New York Life Ins. Co.,* 228 U. S. 364 (1913); *Curtis v. Loether,* 415 U. S. 189 (1974).

27. *Colgrove v. Battin,* 413 U. S. 149 (1973), approved the use of a six member jury in civil cases.

28. The District Court's appointment of a special master was entirely conventional and appropriate. *See In re Peterson,* 253 U. S. 300, 307 (1920), which approved appointment of a master in

In re Winn, 213 U. S. 458 (1909) (involving removal) and *United States Alkalai Export Association v. United States*, 325 U. S. 196 (1945) (primary jurisdiction), while both mandamus cases, have nothing to do with the right to jury trial or any other issues involved in this litigation.

Because the decisions below were discretionary, both in the District Court and the Court of Appeals; because the decisions can be fully and adequately reviewed after final judgment; and because the issuance of mandamus at this point in the proceedings would result in impermissible piecemeal review, the decision of the Court of Appeals was correct and the petition should be denied.

B. The Petition Fails to State a Reason for Granting Certiorari.

Rule 17 of this Court provides:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling or fully measuring the court's discretion, indicate the character of reasons which will be considered: . . .

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in con-

28. (Cont'd.)

a jury case and reception of his report as "prima facie evidence both of the evidentiary facts and of the conclusions of fact." See also the Manual for Complex Litigation, Pt. 1, § 3.20 (1977 ed.) which recommends appointment of a master in "involved accountings" and "assisting in the distribution of funds among members of the class."

> flict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. . . .
>
> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Petitioner Mead has shown no conflict among the circuits, no conflict with the decisions of this Court, no important question of federal law that this Court has not previously decided, and certainly no unusual departure from the normal course of judicial proceedings.

To the contrary, the petition seeks to interrupt and disrupt the normal course of judicial proceedings to seek interlocutory and piecemeal review of questions that can be fully and completely reviewed after the entry of final judgment.

1. The Court of Appeal's Refusal to Grant Mandamus Does Not Conflict With the Seventh Amendment, With the Decisions of This Court Interpreting the Seventh Amendment, or With the Decisions of Other Courts of Appeals.

Mead does not claim that the District Court's bifurcation order was in itself inappropriate—its petition admits that Mead itself requested bifurcation before trial. Petition, p. 16 n. 22. Nor can Mead maintain that contested issues of fact are being determined by the judge rather than the jury: A jury has already tried all issues save one;

and if contested factual issues remain after the special master's report and disposition of the parties' motions for summary judgment, those issues will likewise be sent to a jury. Mead's only complaint is that after nearly four months of jury trial, Judge Singleton did not retain the *same* jury to decide any potentially contested factual issues that may or may not arise in calculating the dollar amount of judgment. For nearly half a century it has been the law that trial by separate juries of separable issues in a single case does not violate the right to a jury trial under the Seventh Amendment.[29]

In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494 (1931), the Court of Appeals for the First Circuit had reversed a jury verdict for the counterclaim plaintiff because of errors in the charge of the trial court regarding the measure of damages, and remanded for a new trial limited to the issue of damages. On *certiorari* in this Court, the counterclaim defendant demanded a new trial of the entire matter, arguing that a partial retrial that allowed the case to be determined by two different juries violated its rights under the Seventh Amendment. Although the English common law provided no procedure for trying only part of a case to a second jury on remand, this Court held that a party could be accorded its Seventh Amendment jury trial right by the submission of separable issues to separate juries:

> "Here, we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not

29. Significantly, Mead's request for bifurcation *did not* specify any request for retention of the same jury, as Mead now claims. See Defendants' Preliminary Pretrial Order, ¶ IV.4 (Pl. App. at A17). That detail finds no support in the record, and appeared for the first time in Mead's petition for mandamus in the Court of Appeals.

compel a new trial of that issue even though another and separable issue must be tried again."

The determination of *Gasoline Products* has become settled practice. While not a routine procedure, the submission of separable issues to separate juries is recognized, in appropriate cases, to be within the informed and constitutional discretion of the trial court. As Professors Wright and Miller articulate the rule:

> "It has been held, on sound ground, that the Seventh Amendment is not violated by the separate submission of the issues to a single jury. *Is there a violation of the constitutional provision if issues are separately submitted to separate juries? The answer rather clearly must be in the negative.* When a single jury has passed on all issues, but error has tainted its verdict on one of the issues, it is now quite settled that there may be a new trial before a second jury limited to that single issue, provided that the error requiring a new trial has not affected the determination of any other issue. In this instance the result is that different juries ultimately resolve the issues. An argument that two juries may be used if one jury has first decided all the issues—though its verdict as to one of them has passed out of the case—but that two juries may not be used in the first instance seems untenable. The great guaranty of the Seventh Amendment will hardly support such a gossamer distinction." 9C Wright & Miller, Federal Practice & Procedure, § 2391, pp. 302-03. (Emphasis added.) (Footnotes omitted.)

Mead would have this Court believe that the procedure adopted by the trial judge in this case is a novel extrapolation of *Gasoline Products,* initiated by "a few courts" "in the last five years". (Petition, pp. 16-17.) In

fact, Wright & Miller's reading of *Gasoline Products* has been uniformly adopted by courts passing on the subject for almost two decades.

In 1959, the Northern District of Illinois adopted a local rule providing for the bifurcation of damages from liability in civil trials. A year later in *O'Donnell v. Watson Brothers Transportation Co.*, 183 F. Supp. 577 (N. D. Ill. 1960), Judge Miner, relying on *Gasoline Products*, explicitly upheld this procedure against Seventh Amendment challenge, when circumstances required the use of separate juries for the separable aspects of the case. Likewise, in *Union Carbide and Carbon Corp. v. Nisely*, 300 F. 2d 561 (10th Cir. 1962), an antitrust case, the Tenth Circuit expressly approved a procedure similar to the one used in this case, where class claimants presented evidence of damages to a master, to be calculated according to a formula reached earlier by jury verdict. There was no violation of the right to a jury trial, the court concluded: "If in the process of identifying the members of the class and assessing the amount of their respective damages, unresolved questions of fact are disclosed, it is time enough to submit those questions to a jury duly empaneled for that purpose." *Id.* at 589. Subsequent years are peppered with reported cases ordering and upholding the use of separate juries for separable issues.[30]

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30. *See, e.g., In re Ampicillin Antitrust Litigation*, 1980-81 Trade Cas. ¶ 63,750 (D. D. C. 1981); *Martin v. Bell Helicopter Co.*, 85 F. R. D. 654, 659-60 (D. Colo. 1980); *Payton v. Abbott Labs*, 83 F. R. D. 382, 394 (D. Mass. 1979); *Franchi Construction Co. v. Combined Insurance Co. of America*, 580 F. 2d 1, 7 (1st Cir. 1978) (dictum); *In re Gap Stores Securities Litigation*, 79 F. R. D. 283, 305 n. 22 (N. D. Cal. 1978); *In re Plywood Antitrust Litigation*, 1979-1 Trade Cases, ¶ 62,459 (E. D. La. 1978), *appeal docketed*; *Arthur Young & Co. v. U. S. District Court*, 549 F. 2d 686, 693 (9th Cir.), *cert. denied*, 434 U. S. 829 (1977); *In re Folding Carton Antitrust Litigation*, 75 F. R. D. 727, 735-36 n. 10 (N. D. Ill. 1977)

Indeed just last week the Third Circuit approved the bifurcation of a securities class action in which the issues of liability and damages were tried to separate juries empanelled more than two years apart. *Sharp v. Coopers & Lybrand,* No. 80-2229 (3d Cir. April 28, 1981), Slip Op. pp. 5-6, 34.

In an effort to manufacture a conflict among the circuits sufficient to warrant the grant of *certiorari,* Mead cites two cases that declined, on interlocutory appeal, to address the question of the constitutionality of bifurcation orders,[31] one case that refused to pass on the issue because it was not before the court [32] and dictum from a district court decision opining that the issue may be "unclear".[33] Mead also cites *Alabama v. Blue Bird Body Co.,* 573 F. 2d 309, 318 (5th Cir. 1978), which held that the Seventh Amendment protects the "general right of a litigant to have only one jury pass *on a common issue of fact.*" [34] The

30. (Cont'd.)

(*dictum*: unitary jury preferable where possible, but two juries constitutionally permissible); *In re Master Key Antitrust Litigation,* 70 F. R. D. 23 (D. Conn.), *appeal dismissed,* 528 F. 2d 5 (2d Cir. 1975); *Eastern Fireproofing Co. v. U. S. Gypsum Co.,* 50 F. R. D. 140 (D. Mass. 1970) (jury trial on liability, followed by master's report on damages, and presentation of report to jury three years later); *Swofford v. B&W, Inc.,* 34 F. R. D. 15, 20 (S. D. Tex. 1963), *aff'd.* 336 F. 2d 406, 415 (5th Cir. 1964); *Driver v. Phillips,* 36 F. R. D. 261 (E. D. Pa. 1964); *Dickinson v. Burnham,* 197 F. 2d 973, 980-81 (2d Cir. 1952), *cert. denied,* 344 U. S. 875 (1952).

31. *In re Master Key Antitrust Litigation,* 528 F. 2d 5, 15 (2d Cir. 1975); *Link v. Mercedes Benz of North America, Inc.,* 550 F. 2d 860, 864-65 (3d Cir.) *cert. denied,* 431 U. S. 933 (1977).

32. *Hosie v. Chicago & North Western R. R.,* 282 F. 2d 639, 642 (7th Cir. 1960), *cert. denied,* 365 U. S. 814 (1961).

33. *Pruitt v. Allied Chemical Corp.,* 85 F. R. D. 100, 117 n. 8 (E. D. Va. 1980).

34. Similarly, the Ninth Circuit's holding in *United Air Lines v. Weiner,* 286 F. 2d 302 (9th Cir.) *cert. denied,* 366 U. S. 924

separability of the issues, of course, was the basis for the trial court's decision to bifurcate in this case. See discussion at pages 23-25, *infra*. Such precedent hardly presents a conflict worthy of this Court's resolution.

Nor is Mead successful in its attempt to conjure up inconsistent precedent from this Court. The principle of *Hodges v. Easton*, 106 U. S. 408 (1882), upon which Mead places such great weight, in no way conflicts with the prevailing interpretation of *Gasoline Products*. *Hodges* overturned a determination of the circuit court because—as the opinion notes in the passage cited by Mead (p. 15)—the result was to

> "have a case at law, which the jury were sworn to try, determined as to certain material facts, *by the court alone*. . . . The court could not consistently with the constitutional right of trial by jury submit a part of the facts to the jury and, *itself determine the remainder*." *Id.* at 411-12. (Emphasis added.)

Here, Mead has already had a jury trial on all but one issue. As to that issue, the trial court has explicited ruled that any genuinely contested issues will be determined by a second jury. There is thus not the slightest question of any material facts being determined "by the court alone", as in *Hodges v. Easton*. If no disputed issues exist, then no Seventh Amendment questions arise. As Justice Brandeis explained in *In re Peterson*, 253 U. S. 300, 310 (1920), "No one is entitled in a civil case to trial by jury

34. (Cont'd.)

(1961), is entirely consistent with the Ninth Circuit's later approval of bifurcation and trial to two juries in *Arthur Young & Co. v. United States District Court, supra*. *United Airlines* held that the issue of punitive damages was not sufficiently separable from the issue of liability to constitutionally allow bifurcation under *Gasoline Products*.

unless and except so far as there are issues of fact to be determined". *Accord, Parklane Hosiery Co., Inc. v. Shore,* 439 U. S. 322, 336 (1979).

It is true, of course, that the procedures of 18th Century England probably did not provide for bifurcation and trial to two juries. Nor did they offer such modern devices as directed verdicts,[35] summary judgment,[36] six person juries,[37] non-mutual collateral estoppel,[38] judgments n.o.v.,[39] or special masters,[40] though all of these are constitutionally permissible. Exact replication of eighteenth century English procedure is not the command of the Seventh Amendment. As the Court noted in *Colgrove v. Battin*:

> "by referring to the 'common law', the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury . . . '[N]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice'." 413 U. S. 155-57.

The bifurcation procedure adopted here accords with this principle. Far from impermissibly usurping the role of the jury, the trial judge appropriately utilized an accepted procedural device to simplify the jury trial and to make it

35. *Galloway v. U. S.*, 319 U. S. 372 (1943).

36. *Fidelity & Deposit Co. v. United States,* 187 U. S. 315 (1902).

37. *Colgrove v. Battin,* 413 U. S. 149 (1973).

38. *Parklane Hosiery Co., Inc. v. Shore,* 439 U. S. 322 (1979).

39. *Neely v. Martin K. Ebby Construction Inc.,* 386 U. S. 317 (1967); *Baltimore Y. Caroline Line Inc. v. Redman,* 295 U. S. 654 (1935); *Montgomery Ward & Co. v. Duncan,* 311 U. S. 243 (1940).

40. *In re Peterson,* 253 U. S. 300 (1920).

more convenient and less complex, burdensome, and expensive for the court, the parties and the jurors.

2. The Bifurcation Adopted in This Case Does Not Deprive Mead of Its Right to Trial by Jury Under the Gasoline Products Standard.

Under *Gasoline Products*, and the cases following it, the constitutional propriety of trial to separate juries turns on the relationship between the issues tried to the separate juries. When issues are "interwoven", a second jury's determination of part of a case risks failing to give due consideration to the findings of the first jury, thereby infringing Seventh Amendment right. On the other hand, distinct and separable issues can be tried to separate juries in a single case because each jury's determination can proceed without impinging on the findings of the other.

Adopting the standard enunciated by this Court in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U. S. 494, 500 (1931), the Courts of Appeals have held that issues of liability and damages may be bifurcated in antitrust cases, without running afoul of the Seventh Amendment, when the issues are "so distinct and separable" that trial on either issue alone could proceed without injustice. *Alabama v. Blue Bird Body Co.*, 573 F. 2d 309, 318 (5th Cir. 1978); *In re Master Key Antitrust Litigation*, 528 F. 2d 5, 14-15 (2d Cir. 1975); *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561, 589 (10th Cir. 1962).[41] The issues bifurcated here plainly meet that standard. In fact they are so distinct and separate as not even to cast a shadow upon one another.

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41. The reason for the "distinct and separable" standard is to avoid inconsistent verdicts or disparate findings. *Alabama v. Blue Bird Body Co., supra*, 573 F. 2d at 318; *Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16, 21 (5th Cir. 1974).

It is important to bear in mind that the bifurcation adopted in this case is much narrower than the bifurcation of *all* "damage" issues ordinarily involved in the reported antitrust decisions such as *Blue Bird* and *Terrell v. Household Goods Carriers Bureau,* 494 F. 2d 16, 21 (5th Cir. 1974). Here the issues of class-wide impact and class-wide measure of damages were tried to the same jury that determined liability. All that remains to be determined is the dollar amount of sales to class members. That issue is not intertwined in the slightest with the issues already determined.[42]

A strong indication that the bifurcated issues in this case do not overlap is that the facts bearing on either set of issues have no bearing on the other set of issues. Thus, the dollar amount of sales to class members—the sole issue in the subsequent proceeding—is a fact to be derived from the accounting records of the conspirator manufacturers. It could have no conceivable bearing on whether a price-fixing conspiracy existed, or whether the conspiracy affected prices to all class members, or if so by how much—the issues determined by the jury in the initial trial.

Conversely, facts tending to prove (or disprove) the conspiracy, or classwide impact or damages, have nothing to do with the dollar amount of a particular manufacturer's sales. For example, the fact that some or even many accounts were not the subject of specific price fixing discussions has nothing to do with how many dollars worth of corrugated boxes Container Corporation of America sold

42. As the District Court found:

"The issue [calculation of dollar damages] does not overlap those submitted to the jury and is not so intertwined with them as to render this decision unjust. It is an arithmetical calculation of a jury-determined percentage of overcharge multiplied by the relevant sales by corrugated manufacturers to class members" (PTO No. 60, p. 3, Mead App. at 6a.).

to class members between 1973 and 1975. Similarly, the occasional appearance of price-cutting in the market does not bear on whether Weyerhaeuser's sales were X dollars or Y during the period. The sales figures are what they are, regardless of price-fixing discussions, price cutting, price or profit variation, and the like.

The concern that bifurcation might lead to inconsistent verdicts on liability and damages simply has no application to the narrow sort of bifurcation at issue here. That concern has arisen in cases involving bifurcation of *all* "damage" issues, where there could be the possibility that the first jury might find that there was injury to business or property while the second jury might on the same evidence of injury in the damage phase, find none. *See e.g., Alabama v. Blue Bird Body Co., supra,* 573 F. 2d at 318.

Here there is no possibility of such inconsistent verdicts. One jury has already heard *all* the evidence on injury to business or property.[43] No such evidence would be relevant to the task of any second jury, whose sole function will be to determine the dollar amount of conspirators' sales to class members.

The issues here bifurcated are thus so separate and distinct as to meet the fairness standard of the *Gasoline Products* case and the decisions of the Courts of Appeals.

C. Conclusion

For all of the foregoing reasons, the Court should deny the petition.

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43. The jury has also heard *all* the evidence of the percentage amount by which the class has been overcharged.

Respectfully submitted,

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Dated: May 7, 1981

Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LTIGATION

THIS DOCUMENT RELATES TO:

ALL CLASS ACTIONS

SPECIAL VERDICT

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

1. Was there a combination or conspiracy (as defined in the Instructions) involving two or more corrugated producers to fix, raise, maintain, or stabilize or to otherwise affect prices of corrugated materials by agreeing not to compete on the basis of price or agreeing to exchange price information, which agreement had the purpose of affecting, or did in fact affect, prices paid for containers and sheets sold throughout the United States.

Yes
(Yes or No)

(If your answer to Question 1 is No, your verdict is for defendant and you should answer no further questions.)

2. If your Answer to Question 1 is yes, was the Mead Corporation a member of the combination or conspiracy?

Yes
(Yes or No)

(If your answer to Question 2 is No, your verdict is for the defendant and you should answer no further questions.)

3. If your answer to Questions 1 and 2 is yes, were any of the following companies also members of the combination or conspiracy?

Alton Box Board Co. *Yes* (Yes or No)

Boise Cascase Corp. *Yes* (Yes or No)

The Chesapeake Corporation of Virginia *No* (Yes or No)

Consolidated Packaging Corporation *Yes* (Yes or No)

Container Corporation of America *Yes* (Yes or No)

The Continental Group, Inc. *Yes* (Yes or No)

Corco, Inc. *No* (Yes or No)

Crown Zellerbach Corporation *Yes* (Yes or No)

Diamond International Corporation *No* (Yes or No)

Dura-Containers, Inc. *No* (Yes or No)

Fibreboard Corporation	*No* (Yes or No)
Georgia-Pacific Corporation	*No* (Yes or No)
Green Bay Packaging, Inc.	*No* (Yes or No)
Hoerner Waldorf Corporation (Champion International Corporation)	*Yes* (Yes or No)
Inland Container Corporation	*Yes* (Yes or No)
International Paper Company	*Yes* (Yes or No)
Interstate Container Corporation	*Yes* (Yes or No)
Longview Fibre Company	*No* (Yes or No)
MacMillan Bloedel Companies	*Yes* (Yes or No)
Menasha Corporation	*No* (Yes or No)
Olinkraft, Inc.	*Yes* (Yes or No)
Owens-Illinois, Inc.	*Yes* (Yes or No)
Packaging Corporation of America	*Yes* (Yes or No)

Potlatch Corporation	*No* (Yes or No)
St. Joe Paper Company	*Yes* (Yes or No)
St. Regis Paper Company	*Yes* (Yes or No)
Southwest Forest Industries, Inc.	*Yes* (Yes or No)
Stone Container Corporation	*Yes* (Yes or No)
Union Camp Corporation	*No* (Yes or No)
U. S. Corrugated Fibrebox Company	*No* (Yes or No)
Western Kraft East, Inc.	*No* (Yes or No)
Weyerhaeuser Company	*Yes* (Yes or No)
Willamette Industries, Inc.	*No* (Yes or No)

4(a) If there was a combination or conspiracy, did it it begin before January 1, 1964 and continue at least until December 31, 1975?

Yes
(Yes or No)

If the answer above is No, specify during what period the combination or conspiracy existed.

_____
(Specify)

(b) Did Mead or any other participant company withdraw from the combination or conspiracy prior to December 31, 1975?

Yes
(Yes or No)

If so, indicate which company and on what date.

Defendant or Other Company	*Date*
Crown-Zellerbach	Jan. 1970

(Use a separate sheet if more room is necessary.)

5. If in your response to Question 3 you found that the combination or conspiracy began prior to March 7, 1973, answer the following:

(a) Did the participants conceal the combination or conspiracy through affirmative acts of concealment?

No
(Yes or No)

(b) Did sheet plant plaintiffs exercise reasonable diligence in regard to discovering the existence of the combination or conspiracy?

No
(Yes or No)

(c) Did plaintiffs other than sheet plant purchasers exercise reasonable diligence in regard to discovering the existence of the combination or conspiracy?

No
(Yes or No)

(d) If the sheet plant purchasers of corrugated containers and sheets had conducted a reasonable investigation after they had cause to investigate, could they have discovered the existence of the combination or conspiracy through the exercise of reasonable diligence.

Yes
(Yes or No)

(e) If the purchasers of corrugated containers and sheets other than sheet plants had conducted a reasonable investigation after they had cause to investigate, could they have discovered the existence of the combination or conspiracy through the exercise of reasonable diligence.

No
(Yes or No)

6(a). If your answer to Questions 1 and 2 is Yes, did the combination or conspiracy cause financial damage to the sheet plants in their purchases of corrugated containers and sheets throughout the United States?

Yes
(Yes or No)

(b) If your answer to Questions 1 and 2 is Yes, did the combination or conspiracy cause financial damage to purchasers other than sheet plants in their purchases of corrugated containers and sheets throughout the United States?

Yes
(Yes or No)

7(a). If your answer to Question 6(a) is Yes, state by what percentage of the purchase price sheet plants were damaged.

5%
(Fill in percentage figure)

(b) If your answer to Question 6(b) is Yes, state by what percentage purchasers other than sheet plants were damaged.

5%

(Fill in percentage figure)

/s/ Carolyn R. Keys

Foreperson

September 13, 1980

Date

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS ACTION RELATES TO:

ALL ACTIONS EXCEPT:

FRANKLIN CONTAINER CORP., ET AL.
(C. A. NO. H-78-671)

SPECIAL VERDICT

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

1. Do you find by a preponderance of the evidence that there existed within the United States an understanding or concert of action between two or more corrugated producers to fix, tamper with, stabilize or maintain the prices of corrugated containers and sheets?

_____
(Yes or No)

(If your answer to number 1 is "Yes," then skip to number 4 and do not answer number 2 or 3)

2. (a) Do you find by a preponderance of the evidence that there existed within the United States an understanding or concert of action between two or more corrugated producers

to exchange present or past pricing information, relating to corrugated containers?

_____

(Yes or No)

(b) If your answer to number 2(a) was "Yes," do you find by a preponderance of the evidence that the understanding or concert of action was for the purpose of or had the effect of fixing, tampering with, stabilizing or maintaining the prices of corrugated containers and sheets within the United States?

_____

(Yes or No)

(If your answers to number 2(a) and (b) are "Yes," then skip to number 4 and do not answer number 3)

3. (a) Do you find by a preponderance of the evidence that there existed within the United States an understanding and concert of action among two or more corrugated producers to exchange past or present pricing data and other information relating to corrugated containers and sheets?

_____

(Yes or No)

(b) If your answer to number 3(a) was "Yes," do you find by a preponderance of the evidence that the understanding or concert of action unreasonably restrained interstate commerce in violation of Section One of the Sherman Act?

_____

(Yes or No)

4. If your answers to number 1 or number 2(a) and (b) or number 3(a) and (b) are "Yes," do you find by a preponderance of the evidence that any of the following defendants participated in that understanding or concert of action?

Alton Box Board Company _____
(Yes or No)

Crown Zellerbach Corporation _____
(Yes or No)

The Mead Corporation _____
(Yes or No)

Westvaco Corporation _____
(Yes or No)

5. If your answer to number 4 is "Yes" for one or more of the defendants, do you find by a preponderance of the evidence that any of the following companies also participated in that understanding or concert of action?

Boise Cascade Corporation _____
(Yes or No)

Champion International Corporation _____
(Yes or No)

The Chesapeake Corporation of Virginia _____
(Yes or No)

Consolidated Packaging Corporation _____
(Yes or No)

Container Corporation of America _____
(Yes or No)

The Continental Group, Inc. _____
(Yes or No)

Corco, Inc. _____
(Yes or No)

Diamond International Corporation _____
(Yes or No)

Dura-Containers, Inc. _____
(Yes or No)

Fibreboard Corporation _____
(Yes or No)

Georgia-Pacific Corporation _____
(Yes or No)

Green Bay Packaging, Inc. _____
(Yes or No)

Hoerner Waldorf Corporation _____
(Yes or No)

Inland Container Corporation _____
(Yes or No)

International Paper Company _____
(Yes or No)

Interstate Container Corporation _____
(Yes or No)

Longview Fibre Company _____
(Yes or No)

MacMillan Bloedel, Inc. _____
(Yes or No)

MacMillan Bloedel Containers, Inc. _____
(Yes or No)

MacMillan Bloedel Ltd. _____
(Yes or No)

MacMillan Bloedel Packaging, Ltd. _____
(Yes or No)

Menasha Corporation _____
(Yes or No)

Olinkraft, Inc. _____
(Yes or No)

Owens-Illinois, Inc. _____
(Yes or No)

Packaging Corporation of America _____
(Yes or No)

Potlatch Corporation _____
(Yes or No)

St. Joe Paper Company _____
(Yes or No)

St. Regis Paper Company _____
(Yes or No)

Southwest Forest Industries, Inc. _____
(Yes or No)

Stone Container Corporation _____
(Yes or No)

Union Camp Corporation _____
(Yes or No)

U. S. Corrugated Fibrebox Company _____
(Yes or No)

Western Kraft East, Inc. _____
(Yes or No)

Weyerhaeuser Company _____
(Yes or No)

Willamette Industries, Inc. _____
(Yes or No)

ALL OF THE ABOVE _____
(Yes or No)

6. If your answer to number 4 (for one or more defendants) is "Yes," do you find by a preponderance of the evidence that the understanding or concert of action existed prior to March 7, 1973?

_____
(Yes or No)

7. If your answer to number 4 (for one or more defendants) is "Yes," and if you found in number 6 that the understanding or concert of action existed prior to March 7, 1973:

(a) Do you find by a preponderance of the evidence that the defendants concealed their understanding or concert of action?

_____
(Yes or No)

(b) Do you find by a preponderance of the evidence that by the exercise of due diligence, the plaintiffs could have discovered the existence of the understanding or concert of action?

_____
(Yes or No)

8. If your answer to number 4 (for one or more defendants) is "Yes," do you find by a preponderance of the evidence that the understanding or concert of action

caused financial damage to the purchasers of corrugated containers and sheets in any of the following areas:

(a) Throughout the United States

_____

(Yes or No)

(If your answer to number 8(a) is "No," then answer the following)

(b) In certain areas of the United States

_____

(Yes or No)

(If your answer to number 8(b) is "Yes," then answer the following)

(c) Identify those areas:

_____

_____

_____

9. If your answer to number 4 (for one or more defendants) is "Yes," state by what percentage of the purchase price purchasers of corrugated containers and sheets were damaged in the geographic area defined in your answer to number 8(a) or (c).

_____

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. 310
(All Class Cases)

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

EXCERPTS FROM DEFENDANTS' PRELIMINARY PRETRIAL ORDER *

I. *Appearance of Counsel*

A. Defendant Alton Box Board Company ("Alton") will be represented by:

Robert B. Maucker
Hoagland, Maucker, Bernard & Almeter
401 Alton Street
Alton, Illinois 62002

Keith E. Kaiser
Stanley E. Crawford, Jr.
Cox & Smith Incorporated
600 National Bank of Commerce Bldg.
San Antonio, Texas 76205
(512) 226-7000

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* This Preliminary Pretrial Order is subject to revision, amendment and supplementation.

B. Defendant Crown Zellerbach Corporation ("Crown Zellerbach") will be represented by:

William R. Norfolk
James E. Tyrrell, Jr.
Yvonne S. Quinn
Daniel D. Caldwell
Theodore O. Rogers, Jr.
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
(212) 558-4000

C. Defendant The Mead Corporation ("Mead") will be represented by:

* * *

III. *Jurisdiction*

The Court has jurisdiction over the matters complained of under Sections 4 and 16 of the Clayton Act (15 U. S. C. §§ 15 and 26), and by reason of the allegations made by plaintiffs under Section 1 of the Sherman Act (15 U. S. C. § 1).

IV. *Motions*

Defendants expect to file the following motions related to the trial of this action: [1]

1. Defendants' Motion for Partial Summary Judgment on the Issue of Fraudulent Concealment.
2. Defendants' Motion *in limine* to exclude at trial all evidence derived from or relating to the record in

1. Defendants reserve the right to file additional pretrial actions.

the case, *United States v. Container Corporation of America* (*"Greensboro"*).

3. Defendants' Motion to Require Separately as to Each Defendant, the Findings Mandated by the Fifth Circuit in *James* as a Precondition to Admission Into Evidence Against Each Defendant of the Hearsay Statement of Alleged Co-Conspirators.

4. Defendants' Motion For Jury to Determine the Issues of Liability and Damages Separately.

5. Defendants' Motion For A Twelve Person Jury.

6. Alton's Motion *in Limine* Regarding Inadmissibility of Pleas of Nolo Contendere Entered By Defendants In Prior Criminal Litigation.

7. Defendants' Motion Regarding Designation Of, Objection to and Ruling On Videotape Deposi-

• • •

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE: CORRUGATED CONTAINER ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL CLASS ACTIONS

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR PROPOSED SPECIAL VERDICT FORM

Plaintiffs' proposed jury instructions and special verdict form conform precisely to the procedures outlined in this Court's class certification decision. Plaintiffs propose that the jury find the amount of damages sustained by the class in terms of a formula which would permit the amount of damages of each class member to be measured. In its class certification opinion the Court anticipated "that the trial on the merits may establish a formula for computing damages." This Court further held that calculation of the amount of damages suffered by each class member, a question individual to each class member, was "susceptible to several methods of treatment, among them references to a master or magistrate. . . ." *In re Corrugated Container Antitrust Litigation*, 80 F. R. D. 244, 253 (S. D. Tex. 1978).

In *In re Plywood Antitrust Litigation*, M. D. L. No. 159, 1979-1 Trade Cas. ¶ 62,459 (E. D. La. 1978), appeal docketed No. — (5th Cir. 1980) (special verdict form attached hereto as Exhibit "A"). Judge Pointer approved and submitted to the jury a special verdict form under Rule

49(a) Federal Rules of Civil Procedure, in which the jury was asked to determine two formulae under which the damage to the class members could be calculated:

"2. (a) Did the use of "West Coast freight" in the pricing of Southern pine plywood during the period from February 23, 1968 to December 31, 1973 cause financial damages to the purchasers of such plywood? _____
(Yes or No)

"(b) If 2(a) is answered 'yes', was that damage equal to the amount by which 'West Coast freight' exceeded the actual freight charge (or the pickup allowance)?" _____
(Yes or No)

• • •

"4. (a) Did the use of 'standard weights' in the pricing of Western fir plywood during the period from February 23, 1968 to December 31, 1973 cause financial damage to the purchasers of such plywood? _____
(Yes or No)

"(b) If 4(a) is answered 'yes', was that damage equal to the amount by which freight calculated on the basis of 'standard weight' exceeded the actual freight charge?" _____
(Yes or No)

In his subsequent opinion rejecting defendants' motion for a judgment notwithstanding the verdict, Judge Pointer explained that since the jury had already determined a damage formula, a second proceeding on damages would "involve relatively simple if numerous mathematical issues distinct and separate from the first trial." *Id.* at p. 76,699.

Judge Pointer explained:

> "While thousands of transactions may be involved, the provisions of FRE 1006 should simplify the presentation of evidence. It may well be that most, if not all, damage claims can be resolved by summary judgment after necessary discovery and data compilations have been completed." *Id.* at note 6.

Judge Pointer noted that the severance of the limited issue of amount of damages sustained by individual class members avoided the necessity of introduction of the details of each member's purchase in the initial proceeding and was the precise method of adjudication of an antitrust civil action sanctioned by the Fifth Circuit in such cases as *State of Alabama v. Bluebird Body Co.*, 573 F. 2d 309 (5th Cir. 1978); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F. 2d 1307 (5th Cir. 1976) and *Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16 (5th Cir. 1974). In *Plywood*, violation, impact and a damage formula were established in the initial proceeding, as they would be in this action.

A similar special verdict form was submitted to a jury by Judge Bechtle in *Ralston Purina Co. v. American Bag & Paper Co.* (*"Consumer Bags Antitrust Litigation"*), Civil No. 77-3092 (filed May 20, 1980 E. D. Pa.) (attached hereto as Exhibit "B").

In that action, the jury was asked:

> "5. What percentage portion of the total amount that Ralston Purina paid to all the conspirators for the purchase of consumer bags during the following periods represented an overcharge proximately caused by the conspiracy?"

In *Union Carbide and Carbon Corp. v. Nisley*, 300 F. 2d 561 (10th Cir. 1961), *cert. dismissed*, 371 U. S. 801 (1962), the Tenth Circuit specifically affirmed a procedure under which initially a jury was asked to determine a measure of overcharge in an antitrust action; [1] a notice was subsequently mailed to class members, and the amount of actual damages to each class member was calculated by a special master. Judge Murrah explained:

> "Nor does submission to a special master violate defendants' right to a single, indivisible jury trial. All operative facts have been determined in the original action. The master serves only to assess the amount of individual damages, based upon the formulae stated in the verdict and appellants' own records. And see Rule 49(a) F. R. Civ. P." 300 F. 2d at 589.

Were a disputed factual issue to arise in the course of assessing the amount of individual damages, the Court held that a jury could be empaneled to adjudicate those questions:

> "If, in the process of identifying the members of the class and assessing the amount of their respective damages, unresolved questions of fact are disclosed, it is time enough to submit those questions to a jury, duly empaneled for that purpose. The interlocutory order of the court does not contemplate the denial of

1. The action was brought under Rule 23 prior to the 1966 amendments.

the right to a jury trial on any unlitigated question of liability." 300 F. 2d at 589.

The procedures suggested by Judge Pointer in *Plywood*, such as use of F. R. E. 1006, would facilitate a jury's task in resolving such issues.

Following both *Nisely* and the Fifth Circuit's decisions in *Swofford v. B & W, Inc.*, 336 F. 2d 406 (5th Cir. 1964) and *Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16 (5th Cir. 1974), both the Second Circuit in *In re Master Key Antitrust Litigation*, 528 F. 2d 5 (2d Cir. 1975) and the Ninth Circuit in *Arthur Young & Co., Inc. v. United States District Court*, 549 F. 2d 686 (9th Cir. 1977) recommended procedures identical to those adopted by this Court under which the issue of the actual amount of individual damages would be calculated in a separate proceeding following determination of liability and a formula for calculating damages at the initial proceedings. Both Circuits held that because calculation of damages was a distinct and separable issue, a separate proceeding on damages would not violate a defendant's right to a jury trial.

In *Arthur Young*, *supra*, the Ninth Circuit explained:

> "We again rely on *Blackie v. Barrack*, *supra*, to dismiss petitioners' contention that the reservation of some damage-related issues for resolution subsequent to the class trial was error. We reach this result not because the individual and reserved issues do not appear real as they concern damages suffered by the class members, but because these damage issues do not, as a rule, defeat class certification in cases such as these, and because separation of a trial on damage issues does not contravene the Seventh Amendment in this case.

"As stated in *Blackie*, 524 F. 2d at 905:

'The amount of damages is invariably an individual question and does not defeat class action treatment. E.g., *U. S. Financial Securities Litigation*, [64 F. R. D. 443 (S. D. Cal. 1974)] at 448 n. 5, and cases there cited. Moreover, in this situation we are confident that should the class prevail, the amount of price inflation during the period can be charted and the process of computing individual damages will be virtually a mechanical task. [citation omitted].'

"It appears to us that after class trial on the primary damage issues in this case as provided by the district court's order, all that will remain is to determine the amount invested and the interest bought by each claimant, then compute damages for each claimant. We find no substantial ground for distinction between *Blackie* and our cases on this issue." 549 F. 2d at 696.

See also the Court's discussion at 549 F. 2d 692-94.

In *Master Key, supra*, the Second Circuit held:

"If the appellees establish at the trial for liability that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee. See *In re Ampicillin Antitrust Litigation*, 55 F. R. D. 269, 275-76 (D. D. C. 1972); *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N. D. Ill. 1969). The amount of such injury could then be computed at a separate trial for damages, and appropriate substratification of classes could be

utilized to facilitate that determination. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561, 567 (10th Cir. 1961), *cert. dismissed*, 371 U. S. 801, 83 S. Ct. 13, 9 L. Ed. 2d 46 (1962); *Amaco Automatic Transmission, Inc. v. Taylce*, 67 F. R. D. 440 (D. D. Pa. 1975); *Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n.*, 66 F. R. D. 581, 591-92 (E. D. Pa. 1975); *Barr v. WUI/TAS, Inc.*, 66 F. R. D. 109, 115 (S. D. N. Y. 1975); *Wainright v. Kraftco Corp.*, 54 F. R. D. 532, 534-35 (N. D. Ga. 1972)." 528 F. 2d at 12 n. 11.[2]

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2. The district judge in *Master Key* discussed and dismissed defendants' constitutional concerns in greater detail:

> "The defendants' other objection to splitting the liability trial from the damage determination is that this procedure will preclude the use of the same jury for both stages, in violation of the Seventh Amendment to the Constitution. *Cf. United Air Lines, Inc. v. Wiener*, 286 F. 2d 302 (9th Cir.) *cert. denied*, 366 U. S. 924, 81 S. Ct. 1352, 6 L. Ed. 2d 384 (1961). The constitutional question turns on whether 'the issue to be [tried to a second jury] is to distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U. S. 494, 500, 51 S. Ct. 513, 515, 75 L. Ed. 1188, 1191 (1931). Here the distinctness of the damage issue seems clear. At the liability stage, it will be determined whether the defendants' conduct included violations of the antitrust laws and whether it affected prices. The proof of the alleged conspiracy and of liability to the plaintiffs will be possible without detailed reference to damages, as set out in note 3, *supra*. Similarly, proof of damages suffered will be possible without detailed reference to liability issues: the issues at this stage will be what the plaintiffs paid for their master key systems and what they would have paid if the defendants had refrained from specific conduct earlier found to be illegal. Thus, I find the defendants' constitutional objections unpersuasive and order that separate trials be held on the issues of liability and

In *Swofford v. B & W, Inc.*, 336 F. 2d 406 (5th Cir. 1964), the Fifth Circuit upheld a ruling by Judge Noel of this Court that the issue of liability in a patent infringement action would be tried separately from the issue of damages. The Court found that such a procedure would not violate the defendant's right to a jury trial under the Seventh Amendment. In *Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16 (5th Cir. 1974), the Fifth Circuit remanded an antitrust action for a separate trial on damages after affirming a jury verdict on the issues of violation and causation.[3]

A recent example of the separate and distinct nature of liability and amount of damages in an antitrust action

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2. (Cont'd.)

damages. *Cf. Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16 (5th Cir. 1974); *Swofford v. B & W, Inc.*, 336 F. 2d 406, 415 (5th Cir. 1964), *cert. denied*, 379 U. S. 962, 85 S. Ct. 653, 13 L. Ed. 2d 557 (1965); *LoCicero v. Humble Oil & Refining Co.*, 52 F. R. D. 28 (E. D. La. 1971)." 70 F. R. D. 23 at 29. (D. Conn. 1976).

Accord, *Link v. Mercedes Benz of North America, Inc.*, 1975-2 Trade Cas. ¶ 60,534 (E. D. Pa. 1975), *appeal dismissed*, 550 F. 2d 860 (3rd Cir. 1976) ("it may be possible to utilize a special master to calculate damages of individual class members").

3. In *Parklane Hosiery v. Shore*, — U. S. — 99 S. Ct. 645 (1979), a private action brought to recover damages arising from a violation of the federal securities laws, the Supreme Court held that a partial summary judgment on the issue of violation which had been determined in a prior government civil action was proper, based upon collateral estoppel. The Court held that the fact defendant had no right to jury trial in the prior government action did not bar the entry of summary judgment in the subsequent private action in which a jury had been demanded. The Court noted that the private plaintiff would still be required to prove causation and damages.

is *Phillips v. Crown Central Petroleum Corp.*, 395 F. Supp. 735 (D. Md. 1975) (liability) 426 F. Supp. 1156 (D. Md. 1977) (damages), *aff'd in part and rev'd in part*, 602 F. 2d 616 (4th Cir. 1979) *cert. denied*, — U. S. —, 100 S. Ct. 1021 (1980) in which separate trials were held several years apart on the issues of liability and damages in a price fixing action. See also, *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 776 (1975) ("trial solely on the issue of liability").

As in *Nisely* and *Plywood*, application of a percentage damage verdict returned by a jury in this action to the actual purchases by each class member to determine actual damages incurred involves issues separate and distinct from those determined by the jury in its verdict. As in *Plywood*, such a procedure avoids "that part of trial which would be concerned with details of individual purchases and purchasers. . . ." 1979-1 Trade Cases at page 76,699. Accord, *Nisely*, 300 F. 2d at 589. The only factual questions remaining to be adjudicated would be the amount of corrugated purchased by the claimants.

The majority of claims could be adjudicated either upon summary judgment, as Judge Pointer foresaw in *Plywood*, or, as was done in *Nisely*, by submission to a special master—or by a combination of procedures. Any outstanding factual issue remaining could then be submitted to a jury for determination. See, e.g., *Plywood*, 1979-1 Trade Cases at p. 76,699, note 6; *Nisely*, 300 F. 2d at 589; *Arthur Young v. United States District Court*, 549 F. 2d 686, 693 (9th Cir. 1977); *see also, Connecticut Importing Co. v. Frankford Distilleries*, 42 F. Supp. 225 (D. Conn. 1940) (submission of Master's report to jury).

To adjudicata the actual damages to each claimant prior to adjudication of liability and actual filing of claims would be a waste of resources, *see e.g., In re Antibiotic*

Antitrust Actions, 333 F. Supp. 278, 288 (S. D. N. Y. 1971) *mandamus denied sub nom, Pfizer v. Lord*, 447 F. 2d 122 (2d Cir. 1971), since all class members may not file claims and the most efficient source to begin determination of the actual purchases of class members would be from the claim forms they submit.

The procedures employed in both *Plywood* and *Nisely*, under which the final judgment was held open to permit filing and adjudication of actual claims of class members, have frequently been applied in those class action cases which ave proceeded to trial. *See e.g., Gerstle v. Gamble-Skogmo, Inc.*, 298 F. Supp. 66, 104 (S. D. N. Y. 1969), 332 F. Supp. 644 (1971) 348 F. Supp. 979 (1972) *modified and aff'd*, 478 F. 2d 1281 (2d Cir. 1973); *Gould v. American Hawaiian Steamship Co.*, Civil Action No. 3707 (D. Del. Memorandum Opinion, June 28, 1974) *vacated on other grounds*, 535 F. 2d 761 (3d Cir. 1976) (attached hereto as Exhibit "C"); *Brennan v. Midwestern United Life Insurance Company*, 286 F. Supp. 702, 729 (N. D. Ind. 1968), *aff'd*, 417 F. 2d 147 (7th Cir. 1969) *cert. denied*, 397 U. S. 989 (1970); *Dickinson v. Burnham*, 197 F. 2d 973, 980-981 (2d Cir. 1952) *cert. denied*, 344 U. S. 875 (1952).

In each of the above cases, a formula of damages was established at trial and final damages to each class member determined by application of the formula to the actual claims filed.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that their instruction on damages and special verdict form be adopted.

Respectfully submitted,

MANDELL & WRIGHT
Stephen D. Susman
Chairman, Plaintiffs'
Steering Committee
Gary V. McGowan
William H. White
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BERGER & MONTAGUE, P. C.
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Howard Langer
1622 Locust Street
Philadelphia, Pennsylvania 19103

By STEPHEN D. SUSMAN
Stephen D. Susman
On Behalf of All Plaintiffs

Dated:

September 5, 1980

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of September, 1980, a true and correct copy of the foregoing was served on the following counsel:

Harold F. Baker, Esq.	(by messenger)
John D. Roady, Esq.	(by messenger)
William E. Wright, Esq.	(by regular mail)
Jerold F. Salzman, Esq.	(by regular mail)

By STEPHEN D. SUSMAN
Stephen D. Susman

Exhibit "A"

IN RE PLYWOOD ANTITRUST LITIGATION

M. D. L. Docket No. 159
(All Cases)

SPECIAL VERDICT

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

1. (a) Was the use of "West Coast freight" in the pricing of Southern pine plywood during the period from February 23, 1968, to December 31, 1973, the result of a conspiracy between two or more manufacturers of softwood plywood? *Yes* (Yes or No)

(b) If 1(a) is answered "yes", which plywood manufacturers were parties to that conspiracy?

—Georgia Pacific Corporation? *Yes* (Yes or No)

—Weyerhaeuser Company? *Yes* (Yes or No)

—Williamette Industries, Inc.? *Yes* (Yes or No)

—all other manufacturers of softwood plywood? *No*

(Yes or No)

—some other manufacturer(s) of softwood plywood? If answered "yes", which other manufacturer(s)? *Yes*

(Yes or No)

Southern Pine Plywood Manufacturers

2. (a) Did the use of "West Coast freight" in the pricing of Southern pine plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood? *Yes*

(Yes or No)

(b) If 2(a) is answered "yes", was that damage equal to the amount by which "West Coast freight" exceeded the actual freight charge (or the pick-up allowance)? *Yes*

(Yes or No)

3. (a) Was the use of "standard weights" in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, the result of a conspiracy between two or more manufacturers of softwood plywood? *Yes*

(Yes or No)

(b) If 3(a) is answered "yes", which plywood manufacturers were parties to that conspiracy?

—Georgia Pacific Corporation? *Yes*

(Yes or No)

—Weyerhaeuser Company? *Yes*

(Yes or No)

—Willamette Industries, Inc.? *Yes*

(Yes or No)

—all other manufacturers of softwood plywood? *Yes*

(Yes or No)

—some other manufacturer(s) of softwood plywood? If answered "yes", which other manufacturer(s)? *No*

(Yes or No)

4. (a) Did the use of "standard weights" in the pricing of Western fir plywood during the period from February 23, 1968, to December 31, 1973, cause financial damage to the purchasers of such plywood? *Yes*

(Yes or No)

(b) If 4(a) is answered "yes", was that damage equal to the amount by which freight calculated on the basis of "standard weight" exceeded the actual freight charge? *Yes*

(Yes or No)

DALE A. GRIDEZ
Foreman

Exhibit "B"

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-3091

RALSTON PURINA COMPANY

v.

AMERICAN BAG & PAPER COMPANY
INTERROGATORIES TO THE JURY

1. Did there exist between 1950 and 1976 a conspiracy to fix the prices at which consumer bags were to be sold to plaintiff Ralston Purina? YES___ NO X

(If "Yes," answer question #2. If "No," answer no more questions.)

2. Was American Bag and Paper Company a member of the conspiracy? YES___ NO___

(If "Yes," answer question #3. If "No," answer no more questions.)

3. Did American Bag and Paper Company ever withdraw from the conspiracy?

(If "Yes," fill in the date withdrawal took place:

_____
(date)

(If your answer is either "Yes" or "No", answer question #4.)

4. Was the existence and operation of the conspiracy fraudulently concealed from plaintiff Ralston Purina?

YES___ NO___

(If "Yes", fill in the date the fraudulent concealment ended, if it did: _____)

(If your answer is either "Yes" or "No," answer question #5.)

5. What percentage portion of the total amount that Ralston Purina paid to all the conspirators for the purchase of consumer bags during the following periods represented an overcharge proximately caused by the conspiracy?

1950 to October 29, 1972: _____%

October 29, 1972 to November 1, 1976: _____%

_____

/s/ FOREMAN OF THE JURY

Exhibit "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 3707/3722
CONSOLIDATED

MARVYN GOULD, Executor of the Estate of J. Donald Rogasner, and J. DAVID PINCUS, on behalf of themselves and all others similarly situated,

Plaintiffs,

MARY S. McCORD and CHARLES T. McCORD, JR.,

Intervening Plaintiffs,

v.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, et al.,

Defendants.

MEMORANDUM OPINION

Wilmington, Delaware

June 28, 1974

William Prickett and Rodman Ward, Jr., of Prickett, Ward, Burt & Sanders, Wilmington, Del.; Harold E. Kohn, Aaron M. Fine and Stephen E. Heberfield, of Harold E. Kohn, P. A., Philadelphia, Pa., for plaintiff Gould and all those similarly situated and for intervening plaintiffs.

Samuel F. Keil, of Keil and Keil, Wilmington, Del., for plaintiff Pincus.

WRIGHT, *Senior Judge.*

In an opinion filed on August 17, 1973, 362 F. Supp. 771, this Court held defendants Litton Industries, Inc., Monroe International Corporation Retirement Plan Trust and Joseph T. Casey, collectively known as the Litton defendants, liable to the plaintiff class for violation of § 14 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a). On October 23, 1973, the Court entered an order conforming with that opinion. Paragraph 4 of that Order provides:

> "Judgment shall be entered against said defendants in favor of the plaintiff class in an amount to be determined as follows: $8.25 (the amount of the premium per share determined to have been received by Litton and Monroe) multiplied by the number of shares in the class, and by the 1,050,000 shares owned by Litton and Monroe, and divided by 10,032,000 (the number of shares of McLean Common Stock issued and outstanding immediately prior to the merger)."

Plaintiffs have now moved to enter judgment. Defendants oppose that motion on four distinct grounds.

APPRAISAL SHARES

The Litton defendants contend that the "appraisal shares", those belonging to McLean shareholders who demanded appraisal at the time of the Reynolds-McLean merger and received $45 per share, should not be included in the number of shares in the plaintiff class. It is agreed that among the 2,983,813 shares of McLean Industries common stock owned on the relevant date, May 13, 1969, by McLean shareholders (other than the defendants) who have not opted out of this action, are 185,123 appraisal

shares. If the appraisal shares are included in the relief formula, the judgment against the Litton defendants would be $2,431,083.53; if not, the judgment would be $2,280,253.21.

The Litton defendants concede that it was proper to include the appraisal shares in the class holdings at the time of trial since the defendants were potentially liable to the appraisal shareholders under certain of the alternative theories advanced by the plaintiff class. The Litton defendants argue, however, that under the "premium" theory of recovery adopted by the Court, the appraisal shareholders suffered no monetary damages for which they have not already been compensated. This Court held that the Litton defendants "are liable for damages equivalent to the plaintiff class's proportionate share of the $8.25 premium per share received by these defendants, . . ." 362 F. Supp. at 778. The Litton defendants reason that if the "premium" theory of recovery were applied both to them and to the defendants who previously settled in this action, McLean shareholders were entitled to a total value per share of $43.54.[1] Since the appraisal shareholders have already received $45 per share, they have recovered, according to the Litton defendants, more than their actual damages and are entitled to no further compensation.

1. The Litton defendants compute this figure as follows: (a) the total premium received by the Litton defendants was $8,662,500 ($8.25 x 1,050,000 shares) or approximately 81.5 cents per McLean share outstanding; (b) if the Ludwig group of defendants had not settled and if the same "premium" theory of damages had been applied to them, the premium received by the Ludwig group was $10,345,500 ($8.25 x 1,254,000 shares) or approximately 97.5 cents per share; (c) therefore, the McLean shareholders were entitled to receive the value of their McLean stock, $41.75 per share, plus $1.79 per share, representing their proportionate share of the premium received by the Litton and Ludwig interests, for a total value of $43.54 per share.

See, 15 U. S. C. § 78bb(a); Mills v. Electric Auto-Lite, 396 U. S. 375, 388-389 (1969); Kohler v. Kohler Co., 208 F. Supp. 808, 825 (E. D. Wis. 1962) aff'd, 319 F. 2d 634 (7th Cir. 1963).

This Court has held that "under considerations of equity, the plaintiffs are entitled to participate in any premium obtained by the favored defendants." 362 F. Supp. at 778. The appraisal shareholders, like all other members of the plaintiff class, were deprived of the opportunity of making an informed evaluation of the premium received by the favored defendants as a result of the merger. Nothing in the record indicates that the appraisal shareholders have, through the appraisal mechanism, participated in the premium obtained by the Litton defendants. There is no intuitive or demonstrated reason why the shareholders who demanded appraisal and eventually received $45 per share from Reynolds, the surviving corporation, should be treated differently from other members of the plaintiff class who may have sold their stock after merger for more than $43.54 per share. See, Voege v. American Sumatra Tobacco Corporation, 241 F. Supp. 369, 375 (D. Del. 1965). Therefore, the appraisal shareholders will not be excluded from the plaintiff class.

By casting an equitable remedy requiring them to disgorge the appropriate share of the premium they received in the merger as a monetary limitation on the "actual damages" of any McLean shareholder, the Litton defendants have misconceived the nature of the relief afforded by the Court. This Court did not attempt to fix the "actual" or "out-of-pocket" damages but rather pointed out, "Once a merger has been consummated by means of a materially defective proxy statement, it is impossible to conclusively determine the consequences of the defect or the effect of its deletion or correction." 362 F. Supp. at 777. As between the Litton defendants, who were responsible for

and profited from the defective proxy statement, and the appraisal shareholders, the latter have a superior claim to the proportionate share of the Litton defendants' premium.

Credit for the Previous Settlement

The Litton defendants next assert the "fundamental principle" that absent any punitive damages a plaintiff may only recover in the legal processes the amount of his injury, whether that recovery comes by settlement, by judgment, or otherwise. They argue that if the same premium theory of recovery were applied to both the settling and nonsettling defendants, the total claim for damages of the plaintiff class would be $5,333,644.[2] Since the plaintiff class has already obtained a settlement of $4,000,000 from some of the defendants, the class can now recover no more than $1,333,644 from the Litton defendants, according to this argument.

Even assuming, for purposes of argument, that it would be unjust for plaintiffs to recover more than a proportionate share of the premium obtained by all the defendants, it may also be unjust to allow the Litton defendants to benefit by virtue of this principle. In other words, simply because the plaintiff class may have obtained under the terms of the settlement more than the settling defendants' proportionate share of the merger premium does not require that the Litton defendants should disgorge less than a proportionate share of the premium they obtained. Compare, Theobald v. Angeles, 208 A. 2d 129, 135 (N. J.

2. This amount is calculated as follows: the total premium obtained by all defendants ($8.25 per share x 2,304,000 shares = $19,008,000) multiplied by the percentage of McLean shares, including appraisal shares. In the plaintiff class (28%) yields $5,333,644. The Court at this time makes no judgment as to whether it is proper to apply retrospectively the same premium theory of recovery to the settling defendants as has been applied to the Litton defendants.

1965). If this Court is to limit the plaintiffs' recovery to a proportionate share of the premium, it might, for example, subtract the settling defendants' "overpayment" from the plaintiffs' recovery from the Litton defendants, but allow the settling defendants to obtain contribution from the Litton defendants for the amount of the set-off.

In any event, the question of a credit for the "overpayment" by the settling defendants is integrally related to the question of contribution. See generally, Note, Settlement in Joint Tort Cases, 18 Stan. L. Rev. 486 (1966), Note, Consequences of Proceeding Separately Against Concurrent Tortfeasors, 68 Harv. L. Rev. 697 (1955). This Court does not propose to evaluate the act-off sought by the Litton defendants from the standpoint of fairness among the parties and from the standpoint of the policy favoring settlement without also considering whether contribution is available to any of the defendants. Therefore, the Court will await completion of the briefing and argument of the issue of contribution before deciding whether the set-off is proper.

Stipulation on Damages

The Litton defendants' third contention is that the stipulation on damages agreed upon by the parties and incorporated into an order of the Court on May 10, 1973, (Defendants' Exhibit 4) forecloses any award of damages on the theory adopted by this Court. Paragraph 2 of the stipulation states:

> The plaintiff class does not and will not contend except as covered by paragraphs 6 or 7 herein that a more favorable exchange ratio would have been available to the McLean shareholders relating to the Reynolds-McLean merger if the McLean proxy material had not been deficient as determined by this Court. . . .

Read together, paragraphs 6 and 7 contain the assertion by the plaintiffs that because "defendants breached fiduciary duties under federal fiduciary law or common law to the class" they are obligated "to share the premium which they received, if any, over what the plaintiff class received, pro-rata with the class." The Litton defendants maintain that the relief granted by the Court falls outside the ambit of paragraphs 6 and 7 and therefore is unavailable to the plaintiff class.

This contention must be rejected for the reason that the violations of § 14(a) by the Litton defendants *were* breaches of federal fiduciary obligations. As this Court has stated, "Although it is clear that the 1934 Act creates fiduciary relationships and obligations of corporate directors and establishes a separate and distinct substantive federal law, the Act does so only in the areas it purports to regulate (citations omitted)," 362 F. Supp. 775. The obligations under § 14(a) as to the accuracy and completeness of proxy materials are fiduciary obligations. It is plain, therefore, that this Court found liability and granted relief consistent with paragraphs 6 and 7 of the stipulation on damages.

ENTRY OF JUDGMENT

The parties have taken opposing positions on the timing of the entry of judgment. Because entry of judgment must await disposition of the issues of set-off and contribution, this Court will not enter judgment at this time.

It is so ordered.

/s/ CALEB E. WRIGHT
Judge

Dated: June 28, 1974

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL CLASS ACTIONS

PLAINTIFFS' MOTION FOR PROCEEDINGS PREPARATORY TO ENTRY OF JUDGMENT

Plaintiffs now move this Court for an order for proceedings preparatory to entry of judgment. This order should provide as follows:

(1) The Court should appoint a master pursuant to Fed. R. Civ. P. 53(b), upon a finding that the matters to be referred to master are complicated.

(2) Within sixty days of the entry of the order appointing the master, the master should report on the following matters:

(a) the dollar value of corrugated containers and sheets sold by The Mead Corporation and its co-conspirators (as found by the jury) to class members who have elected to remain in the class, for the

period March 7, 1973, through December 31, 1975; and

(b) the dollar amount of the settlement funds in the class cases that reasonably can be attributed as being given by co-conspirators (as found by the jury) in consideration for release and dismissal of claims of class members against those co-conspirators for the period March 7, 1973, through December 31, 1975.

(3) The master's report should set forth the issues not subject to a bona fide dispute and the issues subject to a bona fide dispute, and for each issue subject to a bona fide dispute the master should render an opinion.

(4) All parties should have access to a prior draft of the master's report, and an opportunity to provide written comments to the master.

(5) The master is authorized to employ any consultants or staff that he believes is necessary for him to perform his prescribed tasks.

(6) All motions for summary judgment on the issue of the dollar amount of damages should be submitted within fifteen days of the master's report.

(7) All responses to any motions for summary judgment should be submitted within fifteen days of the above deadline for filing motions for summary judgment.

(8) Oral argument on any such motions for summary judgment should be had, at the convenience of the Court, within ten days from the filing of all responses to those motions.

(9) After the Court decides all motions for summary judgment, the Court should set for trial immediately all issues of disputed fact, if any, on which the Court does not grant summary judgment.

The grounds for this motion are set forth in the accompanying Memorandum.

Respectfully submitted,

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By: STEPHEN D. SUSMAN
Stephen D. Susman
On Behalf of Class Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL CLASS ACTIONS

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PROCEEDINGS PREPARATORY TO ENTRY OF JUDGMENT

This Court should authorize proceedings leading to entry of a final judgment based upon damages to all class members (except opt-outs) as those damages were measured by the jury. Under the jury verdict, class members are entitled to trebled damages equal to 15% of the dollar value of their purchases of corrugated containers and sheets from the companies found to be co-conspirators by the jury from March 7, 1973 through December 31, 1975. The precise language of Fed. R. Civ. P. 23 and the circumstances of this case require the entry of a judgment expressed as a dollar figure representing the aggregate damages incurred by class members during the limitations period.

Settlement funds offset only a fraction of these damages. The judgment would be reduced, after actual damages are ascertained and trebled, by an amount equal

to that portion of the settlement funds given in consideration for release of claims of class members against co-conspirators for the overcharges during the damage period.

Plaintiffs have now proposed to this Court a procedure for reducing the percentage verdict into a final judgment expressed as a dollar figure. Because the ascertainment of the dollar volume of sales of corrugated containers and sheets by Mead and its co-conspirators may involve complicated accounting issues, this task is ideally suited for referral to a master under Fed. R. Civ. P. 53. The best records of sales by the co-conspirators to class members are in the custody of co-conspirators themselves. These records should provide a basis for summary judgment on all or many of the factual questions necessary to reduce the verdict to final judgment. Masters have often been used in the past to assist both courts and juries in deciding whether there are genuine disputed issues in matters involving accounting or arithmetic calculations.

After identifying disputed issues, if any, a master could render an opinion on these issues. Masters are often used to report on complicated jury issues. Genuinely disputed issues of fact concerning sales of co-conspirators may be submitted to a jury. At a jury trial the findings of the master should be given *prima facie* weight.

I.

This Court Should Enter a Judgment Based on the Damages to All Class Members as Found by the Jury

Fed. R. Civ. P. 23(c)(3) provides that:

> The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, *shall include* and specify or describe to whom the notice provided in subsection

> (c)(2) was directed and who have not requested exclusion, and whom the court finds to be members of the class.

In short, as the phrase "shall include" emphasized above indicates, a judgment in a class action should include the damages of all class members whom the court determined had been duly notified.* The entry of aggregate judgments in favor of the prevailing class or subclass has been routine among class actions that have gone to trial. *Boeing Co. v. Van Gemert*, — U. S. —, 100 S. Ct. 745 (1980) (aggregate judgment in securities class action); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F. 2d 1281 (2d Cir. 1973) (aggregate judgment modified and affirmed in securities class action); *Gould v. American Hawaiian Steamship Company*, 362 F. Supp. 771, 778 (D. Del. 1973), and 387 F. Supp. 163, 172 (D. Del. 1974) (aggregate judgment to securities class), *reversed in part on other grounds*, 535 F. 2d 761 (3d Cir. 1976); *Harmsen v. Smith*, Civ. Action No. 73-460E, 74-345E (N. D. Cal. Jan. 2, 1980), *appeal docketed* (aggregate judgment in securities class action); *Senter v. General Motors Corporation*, 383 F. 2d 222, 229 (S. D. Ohio 1974), *aff'd* 532 F. 2d 511 (6th Cir.), *cert. denied*, 429 U. S. 870 (1976) (aggregate funds created for employment discrimination sub-classes); *Metro Homes v. City of Warren*, 19 Mich. App. 664 (1969), *leave to appeal denied*, 383 Mich. 761, *cert. denied*, 398 U. S. 959 (1970). *Cf. Bebchick v. Public Utilities Commission*, 318 F. 2d 187 (D. C. Cir.) (*en banc*), *cert. denied*, 373 U. S. 913 (1963);

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* This Court has found that all class members were reasonably notified under Rule 23(c)(2) by notice by mail and notice by publication. *See* Pretrial Order No. 30, ¶ 6; Affidavit of William Howard White Re Procedures Used for Individual Notice and Notice by Publication to Class Members, with exhibits (filed November 1, 1979).

Hodgson v. Wheaton Glass Co., 446 F. 2d 527 (3d Cir. 1971).**

The jury found that a conspiracy caused financial damage to the plaintiff class in their direct purchases of corrugated containers and sheets from defendant The Mead Corporation and 19 co-conspirators throughout the United States in the amount of 5% of the purchase prices paid by the plaintiff class for corrugated containers and sheets. Under this Court's interpretation of the law of fraudulent concealment, plaintiffs understand that the Court will limit recovery of damages to purchases by class members from March 7, 1973, through December 31, 1975.* For judgment, actual damages will be trebled, amounting to 15% of the total dollars paid by the plaintiff class for corrugated containers and sheets during that period.**

From treble damages and attorneys fees the Court should deduct a dollar amount equal to that portion of the

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** Because the judgment in this case should include the damages of all class members, and this amount might exceed the amount eventually distributed to claimants, at some point a question might arise concerning the disposition of any residual funds. For the purposes of this note, it should suffice to say that there is a federal statute that will deposit the residue in the United States Treasury, followed by potential state escheat in the absence of any other disposition. 28 U. S. C. § 2042. *See Hodgson v. Wheaton Glass Co.*, 446 F. 2d 527, 535 (3d Cir. 1971); *United States v. Klein*, 106 F. 2d 213 (3d Cir.), *cert. denied*, 308 U. S. 618, 1939.

* Plaintiffs believe that they sufficiently proved fraudulent concealment and that the jury's findings should allow recovery of damages incurred from January 1, 1964 through December 31, 1975.

** The plaintiff class is also entitled to recover from defendant The Mead Corporation its cost of suit including a reasonable attorneys fee.

settlement funds given in consideration for release of claims by class members against co-conspirators for overcharges during the damage period. Settlements received from companies which were not found to be co-conspirators during the limitations period would not be deducted because Mead is not being held responsible in the judgment from purchases from those companies. The settlements from co-conspirators cover a time period longer than the period of recovery by judgment, so that they would be deducted from the judgment in a proportion reflecting the relationship between the period covered by the judgment and the period for which the release of liability was obtained in the settlement. Numerous cases support this approach.*

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* Any reduction to be made to account for any portion of the damages awarded by the jury previously received through settlement with a co-conspirator is to be made following trebling of the total damages. *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U. S. 835 (1957); *Baughman v. Cooper-Jarrett, Inc.*, 430 F. 2d 529 (3d Cir. 1976). *See also Zenith Radio Corp. v. Hazeltine Research, Inc., id.; Carpa, Inc. v. Ward Foods, Inc.*, 536 F. 2d 39, 55 (5th Cir. 1976). "The burden is on the one claiming duplication to show that the damages assessed against him have in fact and in actuality been previously covered in a prior settlement or judgment." *Cates v. United States*, 451 F. 2d 411 n. 21 (5th Cir. 1971) (Brown, C. J. citing *Zenith*). In *Baughman v. Cooper-Jarrett, Inc.*, 391 F. Supp. 671, 678 (W. D. Pa. 1975), the district court reduced the ultimate judgment by that proportion of the settlements with co-conspirators that represented damages for the period for which the jury awarded damages against the sole defendant to proceed to trial. The court refused to deduct that portion of the settlement which represented damages recovered by means of settlement for the period not covered by the damage verdict. The Third Circuit specifically affirmed the pro-rata procedure. *Baughman v. Cooper-Jarrett, Inc.*, 530 F. 2d 429, 533-35 (3d Cir. 1976).

II.

This Court Should Refer This Matter to a Master Who Would Be Well-Suited to Report on These Complicated Issues

Fed. R. Civ. P. 53 describes in detail the use of a master. Complicated issues can be referred to a master in jury cases. Fed. R. Civ. P. 53(b). The instant issue is precisely the kind appropriate for reference to a master, because its resolution entails accounting and arithmetic functions rather than an evaluation of demeanor and the credibility of witnesses. Specifically, the master should determine the dollar value of the corrugated containers and sheets sold by class members (who did not opt-out) by Mead and the 19 co-conspirators during the limitations period. Many co-conspirators may have aggregated their sales of corrugated containers and sheets on some periodic basis; for other co-conspirators calculations might have to be made for invoices. Whenever aggregate sales figures are used, the master must insure that foreign sales, and sales to nonclass members such as opt-outs, defendants, and independent corrugators, are excluded. Finally, the master should determine the relationship between the total dollar volume of sales for the limitations period and for the 1960 through 1978 period covered by the settlement agreements. This last calculation is necessary in order to ascertain the precise amounts of the settlements of the co-conspirators that need to be deducted from the treble damage award to prevent duplicative recovery. All of these tasks do not involve complicated legal issues or issues concerning the credibility of witnesses. They do require complicated accountings. As the *Manual for Complex Litigation*, ¶ 320 (1977 ed.), states:

> When the complex case presents problems which justify appointing a master, a master may perform

> useful functions on matters to be specified in the order such as . . . involved accountings [and] assisting in the distribution of funds among members of the class and other administrative tasks.

The leading case regarding the propriety of referral in jury cases is *In re Peterson,* 253 U. S. 300 (1920). That moderately complex, contract action in the trial court involved "123 deliveries of cargoes . . . made on 91 different days during a period of nine months." Judge Augustus Hand referred all issues, including the issues of damages, to a master (an auditor) who was to segregate those items not contested and those actually in controversy and render an opinion ultimately on the net amount due. The Supreme Court in an opinion by Justice Brandeis upheld the authority of the district court to refer such issues to a master, reasoning that:

> The District Court found that, in order to render possible an intelligent consideration of the case by court and jury, it was necessary to appoint an auditor and confer upon him two functions. The first was to segregate those items upon which the parties agreed and to classify those actually in controversy, and thus, having defined the issues, to aid court and jury by directing their attention to the matters in dispute. The second function of the auditor was to form a judgment and express an opinion upon such of the items as he found to be in dispute. In order to perform these functions, the auditor would be required, not merely to examine boods, vouchers, and other papers, and to make computations, but to hear and pass upon conflicting testimony of the parties and of other witnesses. This full hearing, while obviously necessary to enable the auditor to form a trustworthy

> judgment on the disputed items, would serve also to narrow the field of controversy.
>
> * * *
>
> It may be assumed that if accepted by the court, the report would be admitted at the trial before the jury as prima facie evidence both of the evidentiary facts and of the conclusions of fact therein set forth. The report, being evidence sufficient to satisfy the burden of proof would tend to dispense with the introduction at the trial before the jury of evidence on any matter not actually in dispute. The appointment of the auditor would thus serve to shorten the jury trial, by reducing both the number of facts to be established by evidence and the number of questions in controversy. A more intelligent consideration of the issues submitted to the jury for final determination would result.

253 U. S. at 307. The Supreme Court expressly upheld the constitutionality of this use of a master in a jury case. *Id.* at 310-11. *Accord, Woods v. Holy Cross Hospital,* 591 F. 2d 1164, 1178-80 (5th Cir. 1979). The District of Columbia Circuit also upheld a reference to a master in a jury case that posed issues far less complex than the calculations in this case. *Tendler v. Jaffe,* 203 F. 2d 14 (D. C. Cir. 1953).

Several district court cases support the use of a master in this case. In *Eastern Fireproofing Co. v. United States Gypsum Company,* 50 F. R. D. 140 (D. Mass. 1970), the court in an antitrust, jury case referred the damages questions to a master after a jury trial on liability. Likewise, in *Connecticut Importing Co. v. Frankfort Distilleries,* 42 F. Supp. 225 (D. Conn. 1940), the court referred anti-

trust damages to a master in a jury case for reasons equally applicable to this case.*

* The complaint alleges that the plaintiff by a conspiracy of the defendants, was wrongfully prevented after January, 1937, from dealing in Frankfort products, a business in which it had theretofore been profitably engaged. The plaintiff claims thereby to have sustained a loss of profits and for this loss it claims treble damages.

As a base for the computation of profits alleged to have been lost for the period subsequent to January, 1937, proof of the plaintiff's profits from dealings in Frankfort products prior to 1937 obviously will be required. From plaintiff's own Exhibit 1 and from the affidavit annexed to defendant's motion it is evident that the taking of such proofs will involve a complicated task and one of peculiar difficulty for a jury. For the plaintiff owns substantial real estate which it uses for purposes of its business; and it does a substantial business in the products of many other producers as well as Frankfort. To ascertain the plaintiff's profits from Frankfort is primarily an accounting task requiring the examination of plaintiff's inventories, sales invoices, books of account, and a mass of documentary evidence covering a substantial period of time as well as numerous complicated computations to accomplish the proper allocation of overhead expenses to the sales of Frankfort products.

Experience has demonstrated that the conventional solution of the problem is far from satisfactory. For if the task is left to expert accountants who examine the records and testify to their conclusions therefrom wide variations between the expressed conclusions are apt to result. Whether one expert or several are called, prudence generally requires that the validity of the expert's conclusions be tested by highly technical and detailed cross-examination which is a voluminous mass of evidence, oral and documentary, much of it conflicting, which in the nature of human limitations tends to bewinder rather than to clarify the jurors' minds.

42 F. Supp. at 226.

Judge Estes in *United States v. Wilson,* 21 F. R. D. 173 (N. D. Tex. 1957), granted a motion for appointment of a special master in a case alleging the unlawful conversion of pinto beans because voluminous evidence would be introduced to prove quantities, percentages, market value and ownership of the beans and because the assistance of an accountant would be necessary to understand and analyze some 22 filing drawers or boxes or records and accounts with regard to the transactions. The court reasoned that:

> A case closely on point with the instant case is Ex parte Peterson, 1920, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919. There, the dispute involved 402 items arising out of 123 different deliveries made on 91 different days during a period of 11 months. The instant case involves a greater number of separate transactions, which occurred over a period of approximately 21 months, such transactions taking place on many different days within such period of time. In addition to the particular transaction to which the defendants in this case are a party, the plaintiff's evidence shows many transactions of beans going into and being shipped out of the elevators of the warehouseman in question. In computing damages, consideration of the price of the beans, either at the time of the alleged conversion or at the highest intervening market value calls for evidence as to the price of beans on many different dates. This mass of statistical evidence and arithmetic would most likely wear out a jury after many days of such figures, computation and documents. A Special Master, skilled and experienced in such complications, and given time to study and analyze such evidence from both plaintiff and defendants can clarify and simplify the issues to

> be submitted to the jury. The Master's detailed accounting to determine the damages should aid the jury in arriving at a just verdict.

21 F. R. D. at 175. *See also Stockton v. Altman*, 432 F. 2d 946, 949 (5th Cir. 1970) (damage determination within ability of jury, particularly in light of preliminary reference to a master).*

One very valuable function of the master's report would be to assist the court in evaluating motions for summary judgment. Plaintiffs respectfully suggest that, should

* The above cases are all jury cases. Decisions referring complicated damage issues to masters are legion in non-jury cases. *Equal Employment Opportunity Commission v. Enterprise Association Steamfitters*, 542 F. 2d 579, 588 (2d Cir. 1976); *Pettway v. American Cast Iron Pipe Company*, 494 F. 2d 211, 258 (5th Cir. 1974); *United States v. Masonry Contractors Association of Memphis, Inc.*, 497 F. 2d 871, 876 (6th Cir. 1974); *Southern Agency Company v. LaSalle Casualty Company*, 393 F. 2d 907, 914 (8th Cir. 1968); *Magna Leasing, Inc. v. Staten Island Mall*, 428 F. Supp. 1039, 1044-5 (S. D. N. Y. 1977), *aff'd*, 564 F. 2d 567 (2d Cir. 1977); *Senter v. General Motors Corporation*, 383 F. Supp. 222, 228-30 (S. D. Ohio 1974), *aff'd*, 532 F. 2d 411 (6th Cir.), *cert. denied*, 429 U. S. 870 (1976); *Ellison v. Rock Hill Printing & Finishing Company*, 64 F. R. D. 415, 419 (D. S. C. 1974); *Gottleib v. Sandia American Corporation*, 304 F. Supp. 980, 992 (E. D. Pa. 1969); *Foster v. City of Detroit, Michigan*, 254 F. Supp. 644, 669 (E. D. Mich. 1966); *Mitchell v. Gulf, Mobile & Ohio R. Co.*, 91 F. Supp. 1975, 187 (N. D. Ala. 1950). *Cf. Poster Exchange, Inc. v. National Screen Service Corp.*, 456 F. 2d 662, 668 (5th Cir. 1972) (a protracted antitrust case in which the Fifth Circuit suggested that a master be appointed to determine which questions were still actually in dispute); *Mitchell v. Mitchell Truck Line, Inc.*, 286 F. 2d 721, 725-6 (5th Cir. 1961) (the Fifth Circuit explained the tendency of law to estimate damages which cannot be ascertained with exactitude and suggested that the district judge could refer the "accounting phase of the case and related matters to a master.").

defendant seek to delay entry of judgment, it may be somewhat difficult for this Court to determine whether, for example, a controversy concerning the legibility of invoices is real or contrived. A master could be of great assistance in defining the issues which are subject to a bona fide dispute, rather than simply a contrived dispute.

As to those issues of fact that continue to be disputed so that they cannot be disposed of by summary judgment, the master's report would be *prima facie* evidence of the amount of single damages. *In re Peterson*, 253 U. S. 300, 307 (1920); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F. 2d 39, 53 (5th Cir. 1976); *Burgess v. Williams*, 302 F. 2d 91, 94 (4th Cir. 1962); *Gay v. United States*, 118 F. 2d 160, 162-63 (7th Cir. 1941); *Eastern Fireproofing Co. v. United States*, 40 F. R. D. 140, 142 (D. Mass. 1970); Moore, *Federal Practice* ¶ 53.14[4].

Implicit in this Court's procedure to date is the conclusion that issues of violation, impact, and measure of damages may be submitted to one jury, and the determination of the actual quantum of damages may be submitted to another jury if that issue is not resolved by summary judgment and defendants insist on a jury trial. Since the facts relevant to the former set of issues are distinct and separate from those necessary to prove the latter, the conclusion that they may be tried separately is fully supported by settled law.* *See, e.g., Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494 (1931); *Alabama v. Bluebird Body Co.*, 573 F. 2d 309, 318 (5th Cir. 1978); *Arthur Young & Co., Inc. v. United States District Court*, 549 F. 2d 686, 692-94, 696 (9th Cir. 1977); *In re Master Key Antitrust Litigation*, 528 F. 2d 5, 12 n. 11 (2d Cir. 1975); *Terrell v. Household Goods Carrier Bureau*, 494 F. 2d 16 (5th Cir. 1974); *Woods Exploration & Produc-*

* This issue arises most frequently when appellate courts remand for a trial on less than all issues.

tion Co. v. Aluminum Co. of America, 438 F. 2d 1286 (5th Cir.), *cert. denied,* 404 U. S. 1047 (1971). *In re Plywood Antitrust Litigation,* 1979-1 CCH Trade Cas. ¶ 62,459 (E. D. La. 1978), *appeal docketed; LoCicero v. Humble Oil Refining Co.,* 52 F. R. D. 28, 30-31 (E. D. La. 1971) (Rubin, J.); *Impervious Paint Industries Ltd. v. Ashland Oil, Inc.,* 1980-1 CCH Trade Cas. ¶ 63,138 (W. D. Ky. 1980); *In re Gap Stores Securities Litigation,* 79 F. R. D. 283, 305 n. 22 (N. D. Cal. 1978); 9 Wright & Miller, *Federal Practice & Procedure* § 2391, at 302-03. *Cf. Union Carbide and Carbon Corp. v. Nisely,* 300 F. 2d 561 (10th Cir. 1961) (approving use of master to calculate amount of damages after jury trial on liability), *cert. dismissed,* 371 U. S. 801 (1962); *Goldfarb v. Virginia State Bar,* 421 U. S. 773, 776 (1975) ("trial only on issue of liability").

Conclusion

For the reasons set forth above, class plaintiffs believe that the entry of final judgment in this case should proceed with the appointement of a master, a report by the master within sixty days, prompt resolution thereafter of issues susceptible to summary judgment, and a trial of disputed issues early next year. There is ample precedent for this procedure.

Respectfully submitted,

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On Behalf of Class Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

M. D. L. No. 310

IN RE CORRUGATED CONTAINER
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL CLASS ACTIONS

ORDER

Having considered the briefs of the parties, and having hereby found the certain issues necessary for entry of judgment are complicated, the following procedures preparatory to entry of document in M. D. L. 310 are hereby ORDERED:

(1) _____ is appointed a master pursuant to Fed. R. Civ. P. 53(b).

(2) Within sixty days of the entry of this order, the master should report on the following matters:

(a) the dollar value of corrugated containers and sheets sold by The Mead Corporation and its co-conspirators (as found by the jury) to class members who have elected to remain in the class, for the period March 7, 1973, through December 31, 1975; and

(b) the dollar amount of the settlement funds in the class cases that reasonably can be attributed as

being given by co-conspirators (as found by the jury) in consideration for release and dismissal of claims of class members against those co-conspirators for the period March 7, 1973, through December 31, 1975.

(3) The master's report should set forth the issues not subject to a bona fide dispute and the issues subject to a bona fide dispute, and for each issue subject to a bona fide dispute the master should render an opinion.

(4) All parties should have access to a prior draft of the master's report, and an opportunity to provide written comments to the master.

(5) The master is authorized to employ any consultants or staff that he believes is necessary for him to perform his prescribed tasks.

(6) All motions for summary judgment on the issue of the dollar amount of damages should be submitted within fifteen days of the master's report.

(7) All responses to any motions for summary judgment should be submitted within fifteen days of the above deadline for filing motions for summary judgment.

(8) Oral argument on any such motions for summary judgment should be had, at the convenience of the Court, within ten days from the filing of all responses to those motions.

DONE this _____ day of _____, 1980, in Houston, Texas.

_____

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of October, 1980, a true and correct copy of the foregoing was served by regular mail with first class postage affixed to the offices of:

Harold Baker, Esq.
Jerrold E. Salzman, Esq.
William E. Wright, Esq.
John D. Roady

STEPHEN D. SUSMAN
Stephen D. Susman

EXCERPTS FROM TRANSCRIPT

THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE: CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS
JUNE 12, 1980
VOLUME 6
(MORNING SESSION)

• • •

[79]

ALEX HOPKINS

Q. Probably the best way to approach this is if you will give us, just list the corporations that you recall having price communications with, then we'll go back over that list and try to get some details on each one.

A. Alton Box Board—Do you want the different locations?

Q. Yes, please.

A. Jonesboro, Arkansas, Alton, Illinois, Humbolt, Tennessee, Murfreesboro, Tennessee; Allen Stone Boxes, Halls, Tennessee; Arkansas Container Corp., Tennessee; Arkansas Container Corp., Little Rock, Arkansas; Anderson Box, Tyler, Texas and Indianapolis, Indiana. Bates Container, Fort Worth, Texas; Boise Cascade Corporation, West Memphis—That's Arkansas; Consolidated Packaging, Houston, Mississippi, and Memphis, Tennessee; Container

Corporation—Container Corporation of America, Muskogee, Oklahoma; Container Corporation of America, Memphis, Tennessee; Continental Can, Rogers, Arkansas; Denty Container, which is no longer——

Q. You say it's no longer?

A. No, it's been purchased by Time, Time Industries,

[80]

I think. Hortman, North Little Rock, Arkansas; Hoerner Waldorf, Springfield, Missouri, Sand Springs, Oklahoma, Memphis, Tennessee, Fort Smith, Arkansas, Little Rock, Arkansas; Inland Container, Hattiesburg, Mississippi; International Paper, New York; International Paper, Houston; International Paper, Kansas City, Spring Hill, Louisiana. And I have Russell, Arkansas down here but the fellow I talked to there was at Spring Hill when I talked to him so——

Q. That's with International Paper?

A. Yes. Mead Containers, Memphis, Forth Smith; Midland Container, Jackson, Mississippi; Olinkraft, West Monroe, Louisiana, Fort Smith, Arkansas; Owens-Illinois, Kansas City, Memphis; Southern Missouri Container, Springfield, Missouri; Southern Paper Box, Little Rock and Benton, Arkansas. St. Joe Paper, Memphis, Tennessee; St. Regis Paper, Clarksdale, Mississippi; Tate Container, Fort Smith, Arkansas; Time Container, Fort Smith; Weyerhaeuser, Florence, Alabama, St. Louis, New Orleans——

[81]

Q. New Orleans?

A. Yes, Jackson, Mississippi, and there's probably others that I can't recall.

Q. Let's begin with Alton Box in Jonesboro. Who did you have price communications with in Jonesboro?

A. Dan Beard, John Medlock, Maurice Wood."

Mr. Arps: Your Honor please, I object to that pictorial representation. There is nothing—the answers—they mention the man's name but they don't mention what his connection with whatever company it is. Why can't he mention them and then proceed, although it doesn't hurt me any. It doesn't mention Westvaco, as you know, but I think that's just absurd.

The Court: I'll overrule that objection, Mr. Arps. I think this is a logical way to present it to the jury.

(Continued reading of the Deposition:)

"Q. What is Mr. Beard's position?
A. He's now the General Manager at Jonesboro.
Q. And, Mr. Medlock's?
A. He was General Manager.

* * *

[91]

"Q. Are you sure that you spoke with Mr. Lester in 1975?

A. Yes.

Q. Do you recall the accounts that were involved in this?

A. Rockwell Manufacturing, Jackson, Tennessee is one. And, let's see, gosh, I'm going blank here.

Q. That's okay, we'll go on to something else and if it comes to your mind, let us know.

A. Okay.

Q. These price communications with Lester, Thornton and Collins, what type communications were they, telephone, mail, meetings, all of them?

A. I met them at the Fibre Box Association, and they were mail—the majority, telephone calls.

Q. And what was the result of these communications?

A. We got in line with their prices.

Q. In most cases did these meetings flow both ways; were they seeking price information from you?

A. Yes.

Q. And, you were seeking it from them?

[92]

A. Yes.

Q. And, each of you got in line during those occasions?

A. Yes. In 1970, when I was—John Medlock was taking my prices and in some cases, cutting them, and I couldn't get John to more or less straighten up and fly right. So I sent my salesman over to Jackson, Tennessee to Rockwell Manufacturing, or Rockwell International, I think is the name, to get a chance to quote on their requirements, which he did and which I assumed I was cutting the price because I quoted it quite low, and Clarke Thornton called me and said, 'How come you're doing this,' and I said, 'Well I can't get any satisfaction out of John Medlock in Jonesboro, so I just thought I'd get his boss' attention which Clarke was, John was. He was over the region.'

[93]

Q. Thorton was regional manager?

A. Yes, and I figured, 'I'd been waiting for your phone call because I knew when I cut your best account right your back yard, you'd holler at me,' and I said 'If you can't do anything with John Medlock, I'm going to continue to do it, and he said, 'Well, I'll get that problem straightened out, and he called me back and he said, 'You're not going to have any more problems out of John.' And I said 'Okay, I'll take my prices out.'

Q. You withdrew your quote to Rockwell?

A. Right.

Q. Do you recall when that was?

A. That was probably in 1970, '71.

Q. Was anyone else at Macmillan Bloedel aware of either that price communication or others that you mentioned with Lester Thornton or Collins?

A. Well, at that particular time I was telling you about, Ralph Michaels was regional manager and I'm sure I discussed it with him.

Q. Michaels was regional manager?

A. Yes.

[94]

Q. That was with Hankins, is that right?

A. Yes.

Q. Who else in your office would have those communications?

A. Dave McPherson, my sales service manager and Buster Babb who was sales service manager, now he's on the sales desk, did, oh, in 1970, I guess.

Q. Did Dave McPherson communicate with each of these companies that you've listed communicating with?

A. Yes, sir. He's communicated with Jonesboro, Humbolt, not Alton, Illinois or Murfreesboro, Tennessee, Halls, Tennessee, Allen Stone, yes."

Mr. Montague: Your Honor, we will now read from a transcript of a prior proceeding dated March 12th, 1979.

"Q. Mr. Hopkins, while sales manager at Macmillan Bloedel's Little Rock plant, have you ever spoken to competitors and asked for the prices they were quoting to a particular customer on corrugated boxes or sheets?

A. Yes, I have.

[95]

Q. Were you given that information?

A. Yes, I was.

Q. When you obtained this information, what did you do with it?

A. If I asked for information, I usually broke it back on a profitability basis to see exactly what level it was on and at that point I made a decision as to whether I wanted to more or less subscribe to that number or not as far as accepting it. If it was below cost, I probably wouldn't. And if it had a profit in it, I would probably go along with the price.

Q. Now, what do you mean, sir, if it had a profit you would go along with the price?

A. Well, once I had the bottom figure, and I broke it back up the line, then I could tell whether it did have a profit in it. And if it was way below cost, and I was going to lose money on it, naturally I wouldn't accept the business or I wouldn't quote the price and be competitive. I would either not quote it or quite it high and probably wouldn't get the business at that point.

Q. And if it was a profitable account, how

[96]

would your prices that you put in on the bid to the customer compare with the price you got from your competitor?

A. They would be competitive with his.

Q. And what do you mean by competitive, sir?

A. I would say in the range of a half a percent or a percent, one way or the other.

Q. Basically, then, your profit would be at the level of your competitor or above?

A. Yes. They wouldn't vary a percentage point.

Q. While sales manager at Little Rock, have you ever been called or contacted by competitors and asked for your prices on a particular account?

A. Yes.

Q. And what did you respond?

A. If they called me and they were more or less the right type individual, then I would probably give it to them. I would give it to them.

Q. And what did you expect your competitors to do with this information?

A. To honor my prices.

Q. What do you mean by that, sir, to honor your prices?

[97]

A. Be in the ball park one percent, half a percent, one way or the other.

Q. In other words, not to cut your prices?

A. Right.

[98]

Q. Was it your understanding in your market area that when a corrugated box manufacturer obtained pricing information from a competitor, those prices would be honored?

A. Well, I don't know what a corrugated manufacturer would do with a competitor. My understanding is if I give my numbers out, they are to be honored, And if I ask them for numbers, I will honor them, if that answers your question.

Q. Yes, sir. Does defendant Mead Corporation have corrugated box plants in your market area?

A. Yes, they do.

Q. And where are these located?

A. Fort Smith, Arkansas and Memphis, Tennessee.

Q. Turning first to the Memphis, Tennessee Mead plant, have you had communications with Mead employees at that plant concerning the prices of corrugated boxes and sheets?

A. I had price communications with them concerning corrugated boxes, not sheets.

Q. With whom have you had such communications?

A. Ewing Halford and Sims Dailey.

Q. And what is Mr. Halford's position at the

* * *

[132]

out of it, either.

Q. Based on your experience in your market area, do you have an opinion as to how widespread this practice of price communications was?

A. Well, I know for a fact it was in that seven or eight states that I just mentioned, plus the fact that my opinion is that it was local situations that evolved all over the United States and I'm not so sure——

Q. Sir, could you tell us what you base your opinion upon that this was occurring elsewhere?

A. I think, as I have testified earlier, that if I wanted to know the marketplace, and when a new account was moving into my area, how I would—my operating procedures were to try to get the levels in that account either by calling personally, if I knew those people, or calling one of our sister plants and ask if they knew; and they said, 'Yes, I think I can get that information,' and they got back with me on that information.

I wasn't present in their office when they made the phone call, but I think your question was what was my opinion, and that

[133]

is my opinion, that it was going on in other areas other than my own.

Q. All right, sir. I got the impression today, Mr. Hopkins, and also from your grand jury testimony, that without trying to be specific, that frequently your competitors protected your prices after you had given them to the competitors, but frequently your competitors also cut prices after you gave them out. Is that correct?

A. The majority of the time the prices were honored. There is certainly a percentage of the time they weren't.

Q. All right, sir. And I believe it's also true, is it not, that sometimes when you got a competitor's price you just found that it was far too low, even below your cost, for you to compete?

A. This is true.

Q. And on those occasions, of course, you would either not quote at all or you would just deliberately price yourself out of the ballpark?

A. Yes, sir, I testified to that.

Q. Could you tell us what the purpose of your

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THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

JUNE 12, 1980

VOLUME 7

(AFTERNOON SESSION)

• • •

N. LACEY

[291]

Q. Why should you give another supplier your prices?

A. So that he wouldn't cut my price. I didn't want to lose my profitability in that account, nor to lose my share of that account.

Q. What was your understanding as to why another supplier would give you his prices?

A. So that I wouldn't cut his price.

Q. Did you ever give erroneous pricing information to another supplier?

A. Not to my knowledge, no, sir.

Q. Did you ever receive erroneous pricing information from another supplier?

A. No, sir, not to my knowledge.

Q. When you got a price from another supplier, sir, did you ever cut that price?

A. No, sir.

Q. Why not?

A. If I were to cut his price in an account, he would then seek out one or two of my accounts. A general rule of thumb was two for one and lower my prices in my account.

Q. What was that now? What did you just say, sir, the rule of thumb?

A. If you were going to retaliate, you would take two for one. That would get their attention.

[292]

Q. Accounts would frequently follow salesmen?

A. Yes, sir.

Q. When you were in the corrugated business, had you ever heard of the term, "intelligent price"?

A. Yes, sir.

Q. What does that mean?

A. To not cut the price.

Q. How many quotes—like, say, the Arlington plant, how many quotes would you typically make during the course of a week to customers?

A. I don't remember specifically. I would say in the area of possibly an average of two, maybe a little bit higher than that.

Q. Two a week?

A. Yes, sir.

Q. How many times were you on the phone during a week?

A. In Arlington?

Q. Yes.

A. I would estimate at least four days a week.

Q. Well, did you discuss with your competitors or other suppliers every quote you made?

A. If it was their item, their account, yes, sir.

Q. Now how many quotes did you typically make while you were in San Antonio?

[293]

A. It may have averaged one a week. It might have been a little higher than that.

Q. How often were you on the phone while you were in San Antonio?

A. I would estimate probably two to three times a week.

Q. How come you were on the phone more than you were quoting?

A. Because my competitors were calling me for my market, my current prices.

Q. Couldn't you get some of this price information from customers?

A. Yes, sir, occasionally you could.

Q. You couldn't get it always from customers?

A. Oh, no, not always. No, sir.

Q. Well, when you got it from customers, did you bother to call the other suppliers?

A. Yes, sir.

Q. Why?

A. I wanted to make sure the information I had was correct.

Q. Now how many other suppliers would there typically—like, I mean in Arlington, you have listed a number of suppliers there. Would all those suppliers typically be supplying an account at the

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

JUNE 17, 1980

VOLUME 12

(AFTERNOON SESSION)

• • •

[263]

R. REDMOND

Q. Mr. Redmond, do you know Gene Beeken, Eugene Beeken, from Westvaco?

A. Yes, sir.

Q. Do you recognize him in the courtroom, sir?

A. Yes, sir.

Q. Did you ever exchange price information with him?

A. Yes, sir.

Q. Was it current prices?

A. Yes.

Q. And did you honor the prices you had received from Mr. Beeken?

A. Yes, sir.

Q. To the best of your knowledge, did he honor yours?

A. Yes, sir.

Q. In your opinion, Mr. Redmond, was there an understanding among the major corrugate companies during the sixties to honor each others prices?

A. Yes, sir.

Q. In your opinion, sir, was there a meeting of minds among the companies on this subject?

A. It was an understanding that you'd have to go through to understand. But it was definitely an understanding.

Q. Were you part of that understanding, sir?

A. Yes, sir.

[264]

Q. What, to your knowledge, was the geographic scope of that understanding?

A. Well, it was—I feel it was nationwide.

Q. What was the purpose of that understanding so far as you were concerned, Mr. Redmond?

A. Would you repeat that question. The understanding?

Q. What was the purpose of that understanding?

A. The purpose was to maintain or improve price levels.

Q. Do you think the understanding was effective?

A. Yes, sir.

Q. Were efforts made by you, Mr. Redmond, and others who you dealt with, to your knowledge, to conceal the exchange of pricing information?

A. Yes, sir.

Q. Could you tell the jury some of the things you did to conceal the fact that you were exchanging price information?

A. Well, when this initially happened,—I can't recall exactly when, but my boss instructed me not to send price lists out with the company's stationery.

Then the next step was to remove any evidence of your company name on the price list.

And then we were told to meet for

* * *

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS
JUNE 23, 1980
VOLUME 17
(MORNING SESSION)

[36]

DANAHEY

Q. Now, then, your answer to my previous question about whether you've ever had an agreement with a competitor was incorrect?

A. It's all in interpretation. Yes, I would say I did not answer your question properly. I should say there was an agreement, but again it was unwritten.

Q. So that in the period of time that you were Sales Manager in the sixties you exchanged past market prices with employees of competitors; is that your testimony?

A. Yes.

Q. And now it's your testimony that you had an agreement with those employees of competitors that you would not cut their prices if you received that information; is that your testimony?

A. Yes.

Q. And, likewise, if you gave a past market price to an employee of a competitor, it's now your testimony that you would expect that they would not cut your price; is that correct?

A. Yes, I would expect.

Q. Now, you testified, I believe, that you

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

JULY 7, 1980

VOLUME 33

(MORNING SESSION)

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[14]

E. SCHECHTER

Mr. Susman: Your honor, plaintiffs move the admission of Exhibit 4813.

The Court: All right. It will be admitted into evidence.

Q. (By Mr. Susman). Now, Mr. Schechter, between 1963 and 1965 were you or the sales managers who reported to you on the phone with all of those companies except for Crown-Zellerbach?

A. Yes.

Q. In your opinion, sir, from 1963 to 1975, was there a general understanding or a gentlemen's agreement among the companies that were on the phone in your area that

they would be constructive in the marketplace and honor each other's prices?

Mr. Irvine: I object to the extent it is beyond his opinion, your Honor, as to his understanding.

The Court: I will let him express his opinion.

Mr. Susman: All I asked him was an opinion.

The Court: I will let him express his opinion. I will overrule the objection.

A. Yes.

* * *

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS
JULY 28, 1980
VOLUME 55
(AFTERNOON SESSION)

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Honor.

The Court: You rest?

Mr. Susman: Well, your Honor, we rest pending—we want to hold the record open for some interrogatory answers on sales that we did not receive from Mead. The court will recall an order entered. Those orders have never been forthcoming, your Honor. But pending the introduction of these exhibits, your Honor, we rest.

The Court: All right.

What say the defendants?

Mr. Arps: What do you mean?

The Court: What say the defendants? Are you ready to go forward with your witnesses?

Mr. Baker: We are ready, your Honor.

Mr. Arps: Yes, sir.

Your Honor, could I just——

The Court: Are you ready? If I give you a fifteen-minute recess, will you be ready to go forward with

* * *

[180]

in fact a conspiracy.

Mr. Arps: I take it, your Honor, that I can take an exception to that and that I will be given permission to renew that at the end of the——

The Court: Certainly. I am certain that Mead will want to make a motion at the conclusion of all of it.

Mr. Baker: Well, I want to make a motion when the record is closed, and the record is not yet closed.

The Court: Well, you don't want to make any other motion other than the motion for directed verdict, do you?

Mr. Baker: I want to make a motion for directed verdict with respect to the sheet class, that there has been insufficient evidence to go to the jury in connection with the sheet class; and, secondly, I want to make a motion for a directed verdict with respect to the Mead Corporation, in addition to the sheet class, and the totality, on the grounds that there has been shown no nationwide impact.

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The Court: All right, sir.

Now, let me say, you make that motion in whatever form you want to make it and let the record reflect that I have considered it and overruled it.

Mr. Baker: But before, really, I make it, I would like to hear them say, "I rest."

The Court: Okay, Mr. Baker.

Mr. Arps: Of course, that is my same problem.

The Court: I understand.

Mr. Susman: Your Honor, we introduce exhibits 4890 to 4989, 4990 to 5000, 5003 to 5008D.

And I told your Honor we have a motion pending on exhibit 5001, which is a summary of the manufacturers from which plaintiffs, representative plaintiffs, purchased.

We have filed a motion on that, to introduce a summary into evidence.

Mr. Arps: I don't recall it.

The Court: I haven't seen it.

Mr. Arps: I'm not saying that we

• • •

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very clear. I have already got the exhibit.

Mr. Montague: We are not asking that these be read to the jury, only that they be attached.

The Court: I understand that. This is going to be attached to this list.

Mr. Susman: Thank you, Your Honor.

Mr. Montague: Okay.

The Court: (addressing deputy courtroom clerk) take off the top. Take off the top, summary of deposition testimony, and attach this to this list and put it in there this way, and show it to them and let them work it out with those others.

Mr. Baker: Your Honor, could I leave one thought with you to be thinking about when you're driving back and forth to work?

The question of claim reduction, like the question of trebling of damages, is a question of law for the court to decide after the jury decides the damages

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in the case.

The Court: I know it.

Mr. Baker: I just throw that out.

The Court: I know it. I thought originally—have been thinking of tellin the jury something about that——

Mr. Baker: What I am suggesting——

The Court: —In my instructions to the jury.

I don't know whether to do that or not. If you go on a percentage basis, I don't see any reason to.

Mr. Baker: Well, I do, because I think it's a question of law for the court.

A jury always comes back with, "The Damages for this cause of action are 'X'," and then the court either trebles it and doesn't tell the jury, because

the law says they treble it, or the court throws it out, or the court cuts it in half in accordance with the law that the court decides is none of the jury's business.

The jury is deciding as a matter of

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fact what is the damage dollar impact here.

The Court: But, we can't do it if you don't get these gross sales here.

Mr. Baker: That's what I'm saying. Let us work on that.

Mr. Black: You'll have to be a little flexible with us in terms of demanding that we close our case immediately if we are going to work on that.

Mr. Baker: Maybe your case can be closed subject only to.

The Court: That's fine.

Mr. Black: Sure, something like that.

The Court: Let's close it subject to you doing something.

Mr. Arps: I want to be dead sure that it's subject to that single item, because you keep opening the door and opening the door.

The Court: I am not going to let them reopen this case.

Mr. Black: We don't want to.

The court: They've got all the

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evidence in save and except this gross sales.

Mr. Arps: All right. That's fine with me. We can work it out.

The Court: And if you can work out a figure on gross sales, then you can argue with me about whether we go on a damage or whether we go no a personal issue.

Okay?

Mr. Arps: Okay, Your Honor.

The Court: We will take a 15-minute recess. How long is this—what do you have?

Mr. Arps: What we are going to do is just show a slide presentation.

Mr. Baker: It will take the rest of the afternoon.

Mr. Plevan: Your Honor, it will take 45 minutes of slide presentation and 45 minutes of testimony.

The Court: You can put the slide presentation on this afternoon.

Mr. Plevan: Yes. We will show the slides first and then go right into the

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

AUGUST 26, 1980

VOLUME 85

(AFTERNOON SESSION)

• • •

R. NEFF

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I didn't originate that one.

Q. In any event, the earlier meetings were either meetings—a number of people present, where you were trying to figure out whether everyone understood what they were to do.

A. (Nodding.)

Q. Or, as you pointed out, they had an open line to Mr. Sebaly, and no one today has cast any light on whether Mr. Sebaly got anything over that open line except Mr. Redmond, who testified that he called——

A. Well, you got my documents, and my documents

Q. I'm sorry, you and Mr. Redmond.

A. I know Mr. Redmond's testimony, I know my actual actions.

Q. Okay. In any event, sir, the interview notes which we have now seen on the screen, generated in the Fall of '75, when the real probing began, reflect, sir, that 12 of the 41 people interviewed, or 29 percent of those with pricing authority in the container division, had violated HO-9 and S5.008, isn't that correct, sir?

A. I don't know that to be correct. You are saying they are violations——

Q. Let's have, please, C19.

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I'm going to do this as quickly as I can.

Okay. We begin—what I have done, sir, is taken—the jury has never seen these all at one time, the 41 of them all together. We have had bits and pieces of them scattered through the trial. And I'm not going to read them all, I have just organized them all in a way that I want to see whether you agree with me.

A. I think you have two that are not in evidence, don't you, Mr. Susman?

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Mr. Baker: You objected to this the other day, but if you want to go ahead and use it, I don't have any objection to using it.

You objected, and I was ordered to go ahead and take it down.

Mr. Susman: We would like to use it with Mr. Neff.

Mr. Baker: All right. I don't object.

Q. This is Mr. C. Baker, general manager of Lewisburg. "Have exchanged prices charged to common customers, and they have respected each other's price levels. Previously had same program—" Well, that's enough. There is a violation of the policy, okay? That's number one, with Mr. Baker. It's not necessary—he has said a whole lot of other things.

Mr. Baker: Well, could I suggest that that is an improper question, because we are talking about a plaintiff in this lawsuit that he is talking about, a plaintiff, a sheet plant.

The Court: I don't know, Mr. Baker, what that means. He is an employee of Mead?

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Q. Go ahead, sir. Mister—this Mr. Baker—and his first name is what?

A. Charles.

Q. Charles Baker. He said that, "Previously had same program with General Box until early 1975, when we stopped supplying them."

That's the program of exchanging prices, and General Box—isn't that Southwest Forest?

A. I don't think at that time it was, Mr. Susman.

Q. They became Southwest Forest?

A. They are a sheet plant in Tennessee somewhere.

Q. "Said this was totally stopped recently, when grapevine spread the word of this program," this program being what Mr. Baker was doing?

A. Yes.

Q. I mean, he heard—this is a man who was exchanging prices with competitors until he heard, via the grapevine, that Mr. Baker and Mr. Wheland were gathering

together six months of expense records and hitting the trail to confront them.

A. Not unlike any organization, Mr. Susman, we have grapevines in ours.

Q. In any event, "Has also received prices from another sheet plant, Ohio Valley, who asked him to respect these prices," and say, "To date we have not

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quoted Ohio Quaker. Alton contacted him about one and one-half years ago for price information, but he turned them down because he didn't trust them. No other contacts with major companies. Says word is out that C. C. A. has cut off communications."

The next one, then, is Mr. Blasdell.

A. To answer your question, I agree with this.

Q. It's a violation?

A. It's a violation, no question.

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Q. Next one, Bob Blasdell stated he also on occasion has received calls from competitors of same nature and has placed some. Refused to identify competitors involved.

And that's a violation of the policy, isn't it?

A. I think you probably ought to read the quotation there, so that you get the proper context. Maybe it's unnecessary, because it is a violation of the policy.

Q. Okay. I'm not trying to say how bad the violations are, I'm just —there is a violation of the policy.

A. That's clear.

Q. Clear. Okay. Now, Mr. Bob Cagler. "Another competitor called him and asked him whether if he sent his price list to Cagler, whether Cagler would confirm whether or not Mead was 10 percent under the com-

petitor's price list, as has been reported to the competitor. The competitor was Wilson, Sales Manager, Container Corporation at Muskogee, Oklahoma. He—"meaning Cagler, your employee—"—obliged and did receive the price list. He very candidly stated that he thought this was okay," et cetera.

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Clear violation of the policy, right, no question?

Mr. Baker: Read the rest of it, would you?

Q. "He very candidly stated that he thought this was okay, but that if it were not, he would not do this again. I told him it should not be done. Do not believe there is a future worry here."

A. It's an error, and it's a violation.

Q. It's a violation?

A. Certainly.

Q. Buster Crafts. "No exchange of price information with competitor since last December. Prior to that did advise competitors what we were going to do price-wise, at direction of J. Franey."

Not much question about that one, either, on Mr. Crafts or Mr. Franey?

A. Clearly.

Q. Okay, next. Wilson Dorff. "Has placed and received three or four calls with competitors regarding price information within past year. Cites calls with P. C. A., Embers, St. Regis. Says they stopped after sales meeting in December last year when Garth Miller—" that's the guy who got up and talked about the grand jury

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appearance, and Mr. Wheland spoke antitrust compliance, okay?

A. Yes, sir.

Q. No question about Mr. Dorff?

A. Violation of the policy.

Q. Mr. Franey is clear, too. "Not at Louisville until June. Prior thereto Gardner. Has engaged in price communications with competitors. He doesn't talk about specific price, but he does take and initiate discussions like, 'you are deteriorating the market' et cetera, and would talk about price in terms of percent rather than absolute dollars."

That's clearly a violation of the policy, isn't it, sir?

A. Yes, sir.

Q. "He formerly verified prices with competitors. Since he arrived in Louisville, he has stopped initiating calls to competitors, but has been receiving calls and discussing prices."

And to pinpoint again when he arrived in Louisville, it was in the middle of 1975?

A. I think earlier, sir.

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Q. Okay. In any event, it was after, again, after the violations became a felony and Garth Miller scared everyone in December of '74, right?

A. I would, Mr. Susman, tell you that it's very questionable that he violated the policy in Louisville, in my mind.

Q. Now, Mr. Gestrich—well, let me say, based upon what he told Mr. Baker, it says, "Since he arrived in Louisville he has stopped initiating calls to competitors, but has been receiving calls and discussing prices."

Okay. Now, if he told Mr. Baker the truth, and Mr. Baker accurately recorded it, then no question, he violated it even after he got to Louisville, right?

A. He violated the policy, I give you that.

Q. Mr. Gestrich, there's no question about, "Has exchanged price information with competitors a half dozen times in last six months."

Apparently the December meeting did not scare him enough.

Mr. Glankler: I move to strike counsel's statement.

Q. It didn't, did it?

A. You lost me in the interchange, can you tell me

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what your question was?

Q. We got September, 1975, Mr. Gestrich had already attended a December meeting. You remember that meeting, where Mr. Wheland and Mr. Miller spoke? Mr. Miller spoke about his appearance before the Grand Jury. Mr. Gestrich even after that meeting, as he says, had exchanged price information with competitors a half dozen times in the last six months. Still going on, but at decreasing frequency a year or two ago much more frequent. Has recently exchanged with Greif Brothers, Boise, P. C. A., O. I. Most of these have been initiated by us, primarily by phone or in mail, not in person.

A. Clear violation.

Q. Clear.

Mr. Honsberger. "Has had price communications with competitors in past, but he has shut them off in past year. Prior to 1975 lots of talk went on in zone, and had highest price of any zone in country. This had dried up because the leaders, C. C. A., Mead, Diamond International, St. Joe and Weyerhaeuser, have stopped talking. During the past year he has received and rebuffed calls from Binghamton Con-

tainer, Division of Chesapeake. Written exchange of price information

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went on in past, but not now."

Again, a clear violation of the policy, and Mr. Honsberger does appear to have been influenced by Mr. Miller's speech in December of '74?

A. He cut it off.

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Q. Ed Serger. "No exchange of information on a one-on-one basis, but has told group that he is in trouble on a specific account, and he knows who price cutter is. Price cutter in group. Occurred last year at F. B. A. Christmas party, and says price cutter got the message."

Again, talking about prices or competitive information with competitor, a clear violation of the policy?

A. Yes, sir.

Q. And so even if Mr. Serger actually made a full confession to Mr. Baker, told him everything—and there is some reason to believe he may have some hesitancy—he had violated the policy.

The next one, now, sir, is Mr. Skiver, who testified here. "No communications regarding prices with competitors in last year or so. Did so some years ago to convince competitors that we were not price cutters."

Again, if you believe what this reports, a clear violation of Mead's policy, okay?

A. Yes, sir.

Q. Bob Snell. "Has engaged in communications with competitors in prior years. In prior F. B. A. zone was talkative lot and very close knit for years.

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This seemed to dry up last fall—" last fall is when the felony statute came into effect "—with the result that prices have dropped. In '75 he has received calls—" wait a minute, the communication has dried up, with the result that prices have dropped. "In '75, he has received calls from Lawless, St. Joe and Continental Can and rebuffed them. Also he called Weyerhaeuser to indicate that we were raped at a specific account. Things have really dried up in last three months. Has also received copies of prices or price quotes in mail in '75, threw them away. Hasn't sent anything for a long time. Used to talk about prices to common customer with sheet plant, but no longer. Stopped contacting competitor for verification of prices last year.

Mr. Arps: If your Honor please, I don't suppose it makes a bit of difference whether I can see that or not——

The Court: You can move around, if you want to.

Mr. Arps: I wouldn't Mind, if he would read it loud enough, then I

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wouldn't object.

The Court: All right, sir.

Q. In any event, not much question that Mr. Snell, prior to 1975, was violating your compliance policy?

A. That's right.

Q. Mr. Whitten. "In early 1974, when he first started job, Alton called him regarding prices for particular account, which he gave them, but didn't ask them for their prices. After December—" well, there is a violation, isn't it, right there?

A. It's a competitive contact.

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Q. Not only a competitive contact, he gave him the prices. It's more than a competitive contact.

A. That's correct, it's a violation of the policy.

Q. We need to distinguish between competitive contacts. You had competitive contacts?

A. No question.

Q. You handled them in the right way, by sending them to the lawyer and telling him we ain't interested, but this goes beyond a competitive contact, doesn't it?

A. Yes, sir.

Q. "After December, '74 sales meeting with antitrust compliance talk, he cut them off. No calls since then which he remembers, but he hasn't given or received price information since then. Has received price information in mails recently, and somewhat regularly, from Southeast and Union Camp."

Right?

A. Yes, sir.

Q. Clear violation?

A. Yes, sir.

Q. Okay, sir. Now, if I counted correct, that's 12 of the 41 people with pricing authority, as of the fall of '75, or 29 per cent of those with pricing authority in the Mead Corporation, admitted

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A. Yes, sir.

The Court: All right. We are going to recess until 9:30 in the morning.

(At 4:30, adjournment was taken until 9:30 A.M., August 27, 1980.)

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:

CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 9, 1980

VOLUME 95

(MORNING SESSION)

* * *

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1789, 1790, 1799;
1800, 1813;
1915, 1916, 1917, 1918, 1919, 1966 through 1972, 1977, 1983, 1984, 1989;
1994 and 1996;
1862, 1865, 1885, 1902, 1932 and 2009;
1973, 1974, 2027, 2028, 2029, 2031, and 2033.)

The Court: Now, Mr. Baker, Diane gives me a list, 4929 through 4971.

Mr. Baker: What are they?

The Court: Mead objected to introduction as to damage, has never been ruled on. On 8-5-80 Baker asked for a week to review and file, if any objections to exhibits. Nothing has been filed that I know of.

Mr. Ruyak: Are those the cross examination exhibits?

The Law Clerk: Those are the interrogatories, I imagine.

The Court: These are container directories.

The Law Clerk: Yes, they are the

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damage interrogatories.

Mr. Ruyak: We still object to those, because they in no way show——

Mr. Black: Those are not really necessary in view of the court's decision to submit the case on the——

The Court: Do you withdraw them?

Mr. Cohen: What numbers are we talking about?

The Court: 4929 throuhg 4971.

Here they are, come look at them.

Why don't you offer them into evidence, all of those exhibits, and I will sustain an objection to them on relevancy.

Mr. Black: Okay.

Mr. Cohen: And then should they become relevant, in view of a verdict, or language of verdict——

The Court: Just put the numbers in.

Diane, they offered them in evidence, I sustained the objection to them on the basis that they are not relevant to any issue before the jury.

Mr. Cohen: And that's Exhibits 4929

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through——

The Court: I assume your objection includes an objection on relevancy?

Mr. Ruyak: Yes. Simply stated, because they do not show the sales that the class would have had. They include intracorporate sales, they include sales to opt-outs, and they include sales to other defendants, and therefore they are not accurate dollar sales to the class by year.

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Mr. Cohen: Judge, that's another type of objection.

The Law Clerk: Not really.

The Court: I'm not ruling on that, I am ruling that, insofar as the case before the jury is concerned, they are immaterial. That is the basis upon which I am admitting them in evidence.

Mr. Cohen: And that's 4929 through 4971.

Mr. Ruyak: Your Honor, for the record——

The Court: Now, what else have I got to do?

Mr. Ruyak: —By raising the objection we raised, we are not waiving our objection to the use of the percentage calculations.

The Court: I understand that.

Mr. Ruyak: We have one more document, and I think—actually there are two documents. We don't object to the first one, it's a Mead Document, although they didn't ask Mr. Neff about it in his examination.

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fraudulent concealment, will you state to the jury something that absolves me from asking to reopen the case, because I don't care how you put it, whether you have changed your ruling, or whatever, or on the court's own——

The Court: I'm just going to say I have permitted you to reopen the case.

Mr. Baker: I don't want to reopen the case.

The Court: Mr. Baker, why not? You asked me to let you reopen the case.

Mr. Baker: No. The only reason that I am reading this in is because it's the court's view that the record is deficient to put the question of fraudulent concealment to the jury, and, as I understood it, the court has reopened it for that purpose.

The Court: I'll put it this way: I'll say, by virtue of the fact that the court changed its mind on a ruling, I have permitted Mr. Baker to reopen the case.

Mr. Baker: Right.

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The Court: Okay.

Mr. Baker: All right. For documents only.

Mr. Ruyak: For a few documents.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS

SEPTEMBER 9, 1980

VOLUME 96

(AFTERNOON SESSION)

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2280, 2277.

The Deputy Courtroom Clerk: I don't have 2280.

Mr. Baker: I know it. That's the one we don't have the original of and we will give you the original as soon as we get it back from our office.

The Court: All right. They will all be admitted into evidence——

Mr. Baker: All right. We are ready to go.

The Court: —As redated.

Mr. Black: Okay.

(Jury present, 2:03 P. M.)

The Court: Please be seated, ladies and gentlemen.

As a result of the fact that I changed my mind on a ruling on the admissibility into evidence of certain affidavits, I have permitted Mead to reopen its case to put those affidavits into evidence and have permitted the plaintiffs to introduce some rebuttal evidence. That is the reason I called you back today.

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All right.

Mr. Baker: With the court's permission, I would like to read to the jury a number of affidavits, the first being the affidavit of Theodore F. Craver.

"I am Staff Vice-President and Director of Trade Regulations for Litton Industries, Inc. ('Litton')".

I might say that Litton, if it please the court, is a client of my law firm.

The Court: All right, sir.

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"And am responsible for all Litton's antitrust and trade regulation matters. I have held this position with Litton with various titles, continuously since January 1, 1965. I was an attorney in the Antitrust Division of the U. S. Department of Justice. From April, '61 through December, '64 I was an associate with the Washington law firm of Hogan & Hartson. Thus, I have been practicing antitrust law continuously for the past 24 years.

"During the time that I have been with Litton, my duties and responsibilities have included administration of all antitrust litigation, both private and governmental, involving Litton; liaison with govern-

ment agencies and private parties regarding antitrust inquiries and investigations; counseling Litton officials and employees in antitrust matters; and in showing compliance by Litton with the antitrust laws.

"In order to carry out my duties and responsibilities, it has been

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necessary for me to have a detailed knowledge of the antitrust laws and principles and to keep abreast of new developments by legislation and court decisions.

"We have maintained at the law library at Litton certain periodicals.

"It has been my practice to follow these periodicals regularly and to read various articles in the law journals.

"When *United States versus Container Corporation* was first announced in the *Wall Street Journal,* I read the decision with great care and interest.

"I recall that the decision was widely reported not only in the legal journals, but in the general press. I also recall that the decision was also widely reported in the bulletins of various trade associations.

"Other Litton officials read of the container decision in various newspaper and magazine reports, and I had numerous discussions with division managers, marketing and sales personnel and in-house

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Litton attorneys immediately following the Supreme Court's decision in the *Container* case and on many occasions since then concerning the meaning and impact of the decision.

Because of the significance of the court's decision, I included a digest of the facts, the court's

holding, and the rationale for the court's holding along with an instruction to avoid calling competitors to verify past or current price bids for quotations to customers in a revision of Litton's *Guides for Compliance.*

"The *Guides* were published in a booklet.

"The *Guides* were again revised in '75."

Paragraph, quote, "An important part of Litton's antitrust compliance program is the holding of antitrust compliance meetings," et cetera.

Go on to the next page.

13. "A number of Litton divisions purchase containers of the type involved

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in the *Container* case, and this fact was known to me at the time of the Supreme Court's decision in 1969.

"I do not recall whether any division president asked me if Litton considered bringing a private antitrust suit for damages based on our purchases of such containers.

"I did not seriously consider Litton's bringing such an action because I deemed the time, effort and expense involved too great in relation to Litton's relatively small volume of purchases of containers to warrant Litton's institution of the lawsuit, compared to other pressing matters that were occupying Litton's management and the law department's legal time."

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Mr. Montague: May I make a statement concerning the affidavits?

Mr. Baker: I thought we had discussed that and that there weren't any statements to be made.

Mr. Montague: Quite to the contrary.

I just want to point out, Your Honor, that nothing in the affidavit shows——

Mr. Baker: Your Honor,——

The Court: I told you you could argue that. You can argue that to the jury.

Mr. Baker: (reading) James E. Rambo, being first duly sworn, deposes and says where he lives.

From April 15, 1965 until the present, I have been employed as Vice President and General Counsel of N.R.C. Corporation, formerly the National Cash Register Company, which manufactures and sells business equipment on a worldwide basis.

Because of the scope of our operations an important facet of my duties

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is to keep current on antitrust developments. To this end we have maintained in this office certain library materials.

4. Since 1967 a member of my staff, one of whose principal responsibilities has been trade regulation, has been a member of the antitrust section of the American Bar Association and has received and reviewed publications of that section.

Early in 1969, from one or more of the sources mentioned in paragraphs 3 and 4, I learned and became familiar with the decision and findings of *United States v. Container Corporation.*

N. C. R. was at that time, and remains today, a substantial purchaser of a variety of corrugated con-

tainers for the packaging and shipping of some of its smaller pieces of business equipment and some of its business forms products.

No discussions were held or investigations made to determine whether or not N. C. R. had a claim against manufacturers or sellers or corrugated containers, because

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of the priority of other business in the office.

In January, 1980 N. C. R. filed a claim in this litigation.

I am admitted to the bar of the Supreme Court of the State of Ohio, et cetera.

Turn back to the first page, so we can see what this litigation is.

The United States District Court for the Southern District of Texas, In Re: Corrugated Antitrust Litigation.

Next, affidavit of Lloyd C. Hartman, a member of the bar of California, employed as an attorney for F. M. C. Corporation until my retirement. Currently I continue to serve F. M. C. as a parttime legal consultant.

From 1955 to 1972 I was General Counsel for F. M. C. As part of my duties I was responsible for monitoring recent developments in the antitrust laws during 1969 and 1970.

The law department of F. M. C. Corporation

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maintains a law library.

The law department also had ready access to complete sets of *Federal Supplements, The Federal Reporter* Second Series, et cetera.

5. I first heard of the Supreme Court decision at or about the time the decision was reported.

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As reflected in *The United States vs. F. M. C. Corporation* case, *United States vs. Container* was an important case, and I was familiar with it at or about the time that it was decided by the Supreme Court.

As part of my duties and responsibilities, I regularly read the *Wall Street Journal.*

At the time of the Container decision, I was aware that the case involved corrugated shipping containers.

I have been a member of the antitrust section of the American bar.

In may capacity as General Counsel to F. M. C. Corporation, I recognized that the Supreme Court decision significantly affected the then existing law regarding contacts between competitors——

Mr. Montague: Your Honor, that was supposed to be excised.

Mr. Baker: Sorry, disregard 12.

13. The facts described in the container litigation involved the exchange of price information between

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competitors concerning a type of corrugated container which F. M. C. bought.

F. M. C. Corporation is a substantial purchaser of corrugated containers and many of our manufacturing facilities use corrugated containers in their shipment of finished goods.

18. The container case, along with other antitrust cases, was discussed with members of our management.

No operating personnel requested or suggested an investigation of a claim against Corrugated Container Manufacturers.

After circulating a memorandum about Container, I received no request from anyone to pursue the matter of a claim further.

No officers or employees of F. M. C. Corporation asked me whether or not we had a claim under the Antitrust Laws in view of the Container decision.

I did not direct any investigation of any possible claim of F. M. C.

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Corporation as a result of the Container case.

Although the F. M. C. Corporation purchased the types of corrugated containers that were the subject of the Supreme Court's decision, we conducted no investigation to determine whether or not the company had a claim under the Antitrust Laws in view of the Container case.

Following the Container case, I did not ask anyone else to study the advisability of bringing a lawsuit against Corrugated Container Manufacturers.

No lawyers on my staff suggested that we pursue an investigation of a possible claim by F. M. C. based on the Container decision.

I know of no investigation by anyone at F. M. C. to determine whether we had a claim against manufacturers or sellers of corrugated containers.

No one, either legal or business personnel, recommended to me that we investigate further any possible claim

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that we might have against Corrugated Container Manufacturers in view of the facts described in Container litigation.

F. M. C. Corporation did not pursue any possible claim against corrugated manufacturers and/or sellers of corrugated containers.

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Mr. Baker: Affidavit of William F. Rogers, of the Monsanto—William F. Rogers. My name is William F. Rogers, Antitrust Counsel, Monsanto Company.

Since 1964, I have been the Attorney directly responsible for antitrust for the Monsanto Company. During 1969-71, my title was Senior Attorney-Antitrust.

As a part of my duties and responsibilities I was responsible for keeping up to date on recent developments.

The Law Department maintained a law library.

Go ahead.

The library subscribed to certain things.

To keep up to date on such developments, I regularly reviewed certain publications.

I first heard about the Supreme Court decision and the findings in the *Container* case on or about the time the decision was first reported in the *Wall Street Journal.* I subsequently read and analyzed the full text of the

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opinions shortly after the opinions were published.

The *Container* case was an important antitrust case.

The *Container* case received widespread publicity in legal and lay publications.

I was aware at the time of the container decision that the case involved corrugated shipping containers.

During 1969 and to date I was and am a member of the Antitrust Section of The American Bar.

As a member of the Antitrust Section of The American Bar, I regularly attended the annual Spring meetings of the Antitrust Section, et cetera.

Monsanto was, and remains today a substantial purchaser of a wide variety of corrugated containers.

Many of our plants use corrugated containers.

As Senior Attorney, Antitrust, I was aware that Monsanto company might have an antitrust claim against corrugated

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container manufacturers. I did not recommend that Monsanto institute any action in pursuit of such claim.

George W. Caspar, Vice-President, Secretary and General Counsel of Heublein.

If it please the court, Heublein in the past has been a client of my law firm, although I have not personally done work for them.

I am Vice-President, Secretary and General Counsel of Heublein and held those positions since 1972. I am a member of the New York and Michigan bars, et cetera.

As part of my duties and responsibilities as Assistant and Associate General Counsel, I was responsible for keeping up to date on recent and/or significant developments in the antitrust law.

The Law Department maintained a Law Library.

As Assistant General Counsel, it was my responsibility to review reports, et cetera.

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I first heard about the Supreme Court's Decision and Findings in Container at or about the time the Decision was first reported in the *C. C. H. Reporter,* et cetera.

The *Container* Case was an important antitrust case.

I was aware of and familiarized myself with the *Container* Case at or about the time the Decision was published by the Supreme Court in January, 1969.

As part of my duties and responsibilities I regularly reviewed the *Wall Street Journal* and the *New York Times.* I was aware of articles that appeared in those newspapers concerning the Container Decision.

I have read the Supreme Court's Decision shortly after the Decision was published in January of '69.

From '62 to the present I have been a member of the Antitrust Section.

As a member of the Antitrust Section, I have regularly attended the Spring Meeting held every year in Washington,

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D. C. Many of our plants use corrugated containers.

Heublein has purchased substantial quantities of corrugated containers.

At Heublein we reviewed our own antitrust policy in light of the Supreme Court's Decision in the *Container* Case.

Daniel W. Byles, Senior Counsel, Corporate Staff of Merck & Company.

I have occupied my current position since 1964. Prior to that time I served on the Corporate Legal Staffs of the Vick Chemical Company and Hoffman-

Laroche, Inc. I am admitted to practice in the States of New Jersey and New York.

As part of my duties and responsibilities during the period of time I have served as Corporate Staff Counsel I have been responsible for keeping up to date on recent and significant developments in antitrust law.

They maintained a Legal Library. Subscribed to certain things.

To keep up to date I regularly reviewed the Weekly Reports and Decisions.

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I first heard about the Supreme Court Decision at or about the time the Decision was first reported.

I was aware at the time of the Container Decision that the case involved corrugated shipping containers.

I was aware of and familarized myself with the *Container* Case at or about the time the Decision was published by the Supreme Court.

I regularly reviewed the *Wall Street Journal* as well as the *New York Times.*

I was aware of articles that appeared in those newspapers concerning Container.

I read the Supreme Court Decision.

Merck was, and remains today, a purchaser of a wide variety of corrugated containers for packaging and shipping of pharmaceuticals, chemicals, and industrial cleansers and various products involved in pollution control systems. Over the years Merck has purchased substantial quantities of corrugated containers. Prior to 1977 Merck purchased

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corrugated containers for its since-divested consumer products business.

No one on my staff on the legal department made any recommendation to me concerning any investigation to see if we had a claim against manufacturers or sellers of corrugated containers after the Container Decision was published in 1969.

I did not direct any investigation of any possible claim of Merck as a result of the Container Case at that time, nor am I aware of any such investigation.

Merck & Company in the period 1969 to '79 did not pursue any possible claim against the manufacturers and/or sellers of corrugated containers.

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Donald Wiley of Pittsburg.

During the period 1964 to date, I have been General Counsel of H. J. Heinz Company—which is also, if it please the court, another client of my firm, although I personally have done no work for them——

The Court: All right, sir.

Mr. Baker: —H. J. Heinz Company, Pittsburg-based manufacturer of consumer food products. I am admitted to the Bar of the Supreme Court of the Commonwealth of Pennsylvania.

During the period through 1972, a significant part of my duties was to keep current on antitrust developments. I read or received summaries of significant antitrust decisions and read about them in the newspapers, also.

Go ahead.

At the time of the Container Decision, and through this date, Heinz Company was and is a substantial purchaser of corrugated boxes. During 1969, I received from members of my staff a number

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of memoranda on various seminars and publications dealing with the Container Case, including a memorandum of a speech given by Louis Bernstein, in Philadelphia, Pennsylvania, on April 10, 1969.

In May of 1970, H. J. Heinz Company Antitrust Compliance Letter was modified to reflect our understanding of the decision in the Container Case with respect to the exchange of price information.

Following the Container Decision, I conducted no investigation, nor am I aware of any other investigation at Heinz to determine whether the company had a claim against manufacturers or sellers of corrugated containers.

I attended at least one session of an American Bar Association Antitrust Section Meeting where the decision in the Container Case was discussed, and I engaged in general discussions with other lawyers present at the meeting relating to the Container Decision.

Herman T. Van Mell. My Address is

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180 North La Salle Street, Chicago.

During the period from 1948 to 1977, I was General Counsel of Sunbeam Corporation, Chicago based—which is another company, if it please the court, that my firm has done some work for.

The Court: All right, sir.

Mr. Baker:—Chicago-based manufacturer of small appliances sold to consumers. I retired in 1977.

A significant part of my duties was to keep current on antitrust developments. I read the weekly reports, et cetera.

Since at least 1969 to the present, I have been a member of the antitrust section of the American Bar Association. I have attended the meetings.

In 1970, through some of the above-mentioned and other sources, I became aware of the Supreme Court's decision in *United States v. Container Corporation of America* and was generally familiar with the court's decision that corrugated container manufacturers violated Section 1 of the Sherman Act.

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The facts described in the Container litigation involved the exchange of price information between competitors manufacturing and selling corrugated containers.

Sunbeam Corporation was at that time, and remains today, a substantial purchaser of a wide variety of corrugated containers for the packaging and shipping of small appliances which Sunbeam manufactures.

I discussed the Contained decision with outside counsel, who was long familiar with our company, to determine the *Container* case's impact, if any, upon Sunbeam's standing antitrust compliance program. He determined that Sunbeam's policy was in compliance with the holding of the *Container* case.

Following the *Container* case I conducted no investigation to determine whether our company had a claim against manufacturers or sellers of corrugated containers for Section 1 violations. I know of no investigation by anyone at

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Sunbeam to determine whether we had a claim against manufacturers or sellers of corrugated containers.

Robert H. Hosick, Kalamazoo, Michigan.

Admitted to practice in California, in the Supreme Court. I have been a staff attorney for the Upjohn Company from 1946 to 1977. My last title was as General Attorney.

In the 1940's to the 1970's I was counsel to, among others, in our organization, the marketing and purchasing staffs. I counseled on antitrust matters. I was for many years a member of the American Bar Association and the Michigan State Bar Antitrust Law, et cetera.

In the performance of my duties at the Upjohn Company I regularly kept current on antitrust concepts and new developments.

5. The Upjohn Company was a purchaser of corrugated containers through the 1960's and '70's for use in the packaging

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of pharmaceuticals and other products in plants located in numerous parts of the United States, including the southeast.

I did not authorize any investigation into whether our company had any claims against any suppliers of corrugated containers as a result of the Container decision.

I am not aware of any investigation within the Upjohn Company to ascertain whether we had a claim against any suppliers as a result of that decision.

The Container decision was a subject of discussion among the lawyers at the Upjohn Company.

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William F. Drake, address Alco Standard Corporation, Valley Forge, Pennsylvania.

I am currently Vice President of Administration of Alco Standard. I was Vice President and General Counsel of Alco between November, '68 and 1979. Prior to that time I had been associated with and later a partner of the Philadelphia law firm of Montgomery, McCracken, et cetera.

As part of my duties and responsibilities as General Counsel I was responsible for keeping up on significant developments.

The Law Department of Alco Standard maintained a library.

The keep up to date I reviewed reports.

I first learned about the Supreme Court decision at or about the time it was reported.

The *Container* case has received widespread publicity in legal and lay publications.

I was aware at the time of the

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Container decision that the case involved corrugated shipping containers.

As part of my duties and responsibilities I regularly reviewed the *Wall Street Journal.* I was aware of articles that appeared in those newspapers concerning the Container decision.

I also read about the decision in the Philadelphia Inquirer, the *Business Lawyer,* the *Antitrust Bulletin.*

I read the Supreme Court decision.

Alco Standard Corporation was, and remains today, a substantial purchaser of a wide variety of corrugated containers for the packaging and shipping of products which they manufacture.

Many of our plants use corrugated containers.

The *Container* case, along with other antitrust cases, was discussed with members of our management.

No officer or employees of our company asked whether we had a claim under the antitrust laws in view of the Container decision.

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Although Alco purchased the types of containers that were the subject of the decision, we conducted no investigation during 1969 or the early 1970's to determine whether we had a claim under the antitrust laws as to our past purchases of corrugated containers in view of the *Container* case.

I authorized no investigation by Alco during 1969 or the early 1970's to determine whether we had a claim against the manufacturers or sellers of corrugated containers for fixing or maintaining the price of those containers.

Alco Standard Corporation did not pursue during 1969 or the early 1970's any possible claim against the manufacturers and/or sellers of corrugated containers. This was in part because our corporate legal department had to determine where to expend its limited lawyer resources and at that time we did not place a high priority on the possibility of a claim for price fixing of corrugated containers.

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AFFIDAVIT OF LEWIS BERNSTEIN.

"My residence address is Mohican Hills, Maryland, and my office is 1140 Connecticut Avenue, Washington, D. C.

"Between 1959 and 1977, I was Chief of the Special Litigation Section, Antitrust Division, United States Department of Justice. Since my retirement

from the Department of Justice, I have been in private practice.

"The investigation which resulted in the Container case originated within the Antitrust Division and was conducted under my direct supervision. I was Chief Counsel responsible for developing the facts and legal theory supporting the department's position, and I personally presented the government's case to the District Court.

"The presentation consisted mainly of stipulated facts, documentary evidence, deposition testimony of defendants' officials, and oral argument.

"The facts in the Container case at the District Court level are a matter

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of public record and were largely stipulated. The District Court decided the case against the government on August 31, 1967.

"Container was decided in favor of the government by a divided Supreme Court. Justice Douglas wrote the majority for apparently five members of the court; Justice Fortas concurred; and three Justices (Marshall, Harlan, and Stewart) dissented from the holding of a Section One violation. The court's opinions were published on January 13, 1969.

"The majority decision by the Supreme Court remanding the case to the District Court for further consideration received exceptionally wide publicity and attention in antitrust legal circles. The Supreme Court opinion, I am informed and believe, was reported in numerous newspapers throughout the country, including the *Wall Street Journal* and the *New York Times.*

"In addition, this decision was the subject of numerous law review articles,

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seminars, both formal and informal, and speeches to various legal groups. I recall delivering a talk on the implications of the decision in Philadelphia, Pennsylvania. My notes indicate that the talk was given on April 10, 1969, at a luncheon meeting organized by the Philadelphia Chapter of the Federal Bar Association. I believe that thereafter, almost every article by, or discussion among antitrust lawyers involving the exchange of price information, highlighted the Container decision."

That concludes the reading of those.

At this time, Your Honor, I have—which have been admitted in evidence, if it pleases the court—a large number of newspaper and periodicals at or about, shortly after, the Container decision merely for the purpose of showing widespread publicity. Not to prove the accuracy of the newspaper headlines or anything like that, but merely to show dissemination, which I would like briefly to show.

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Greensboro Daily News, Chicago Sun Times, Atlanta Constitution.

"High court hits paper box firms," et cetera.

Go ahead.

Boxboard Containers, 1969, re the Greensboro case. "What the Supreme Court found and what price swap means to you."

The Wall Street Journal, The Los Angeles Herald Examiner. These are both January 15th, 1969. *The Kansas City Star* and *The New York Times.*

Purchasing Week, January 20, 1969. *The Raleigh News and Observer.* The *Purchasing Magazine,* January 20, 1969.

All right. Thank you, Your Honor.

The Court: All right.

Mr. Kipple.

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Mr. Kipple: Ladies and gentlemen, at this time, the plaintiffs have a rather short rebuttal case to present to you in terms of a few documents, few additional documents that we wish to read small portions of to you, and a few prior statements of individuals that we will read to you by a shortened procedure that I hope works out all right. I will read both the question and the answer.

The first document is No. 5266. Mead Containers Memo to Regional General Managers, District General Managers, District Sales Managers, General Manager-National Account Sales, National Accounts Sales Managers.

Subject: Price increase environment.

Date, January 13, 1972.

"Attached find two reports, the purpose of which is to assist regional management and the division in monitoring the environment in which our price increase program is being carried out. Their usage should be implemented

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MDL No. 310

IN RE:
CORRUGATED CONTAINER
ANTITRUST LITIGATION

TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 10, 1980
VOLUME 97
(MORNING SESSION)

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Perhaps, as I have suggested, that postponement is designed to make sure that those employees who testified or might have testified in this lawsuit continue to have, like Mr. Neff, a deep personal and abiding interest in the outcome of this case.

But, ladies and gentlemen, we have never, never criticized Mr. Baker for doing what he did in the fall of '75. It was a great idea. It should have been done earlier. And the results should have been discussed at least to top corporate officers, to the grand jury, and to the jury that heard the prior proceedings.

When you consider the circumstances, Mr. Baker and Mr. Wheland got some startling admissions. Of course, when you compare what the Mead mana-

gers told Mr. Baker and Mead's in-house counsel, Mr. Wheland, in '75, with what they told the grand jury a few years later, it is obvious that some of them, for obvious reasons, lied to Mead's lawyers about the extent of their pricing communications.

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Mr. Danehy, Foughnie, Hayes and Halford come to mind immediately.

Those lawyers in those interviews were, I'm afraid, much like the plaintiffs' lawyers have been during this trial, only able to uncover the tip of the iceberg.

On the other hand, Mr. Baker and Mr. Wheland were successful in uncovering some things that we couldn't unearth even when we took those folks' depositions under oath.

I have in mind here Messrs. Gestrich, Engen and Kessler. They told at least part of the truth to Mr. Baker and Mr. Wheland, but lied to us in their depositions. And one wonders why those three were not brought by Mead to this courtroom so they could be questioned openly about the inconsistencies.

Yesterday, you'll remember Mr. Kipple read you the sworn deposition testimony of Mr. Bob Gestrich that he had never discussed prices with competitors in 1975. At the same time, Mr. Kipple put up on that screen the one-on-one interview

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would fail to read carefully the numbers core strategies and business plans?

As you have seen, ladies and gentlemen, they establish an undeniable web of relationships and dependencies between and among separate Mead plants.

Let's return to the antitrust policy. You will recall Mead, in its opening statement, telling you that it had successfully implemented that policy and the proof will be that the vast majority of Mead employees lived up to that policy?

Well, I don't need to dwell long on that one. Maybe Mead didn't think the judge would require Mr. Baker to turn over to us his one-on-one interview notes because those notes, standing alone, indicate that 29 per cent of those folks who had pricing authority in '75 had violated the compliance policy. And if you add to that those who subsequently admitted to the grand jury but who did not tell Mead's lawyers that they had engaged in pricing communications, the

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number of violators comes up to whopping 39 per cent.

* * *